No. [redacted]59

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

LOUIS B. MACKENZIE, - - - Petitioner,

versus

A. ENGELHARD & SONS COMPANY, - Respondent.

RESPONSE,
PETITION FOR A CROSS WRIT OF CERTIORARI

TO THE

United States Circuit Court of Appeals
For the Sixth Circuit

AND

BRIEF FOR RESPONDENT.

R. A. McDOWELL,
Counsel for Respondent and Cross Petitioner.

Westerfield-Bonte Co., Incorporated, Louisville, Ky.

A copy of the within response, petition for a cross writ of certiorari and brief for respondent and cross petitioner, together with a notice that the petition will be submitted to the Supreme Court of the United States on May 7, 1923, is hereby acknowledged this 15th day of April, 1923.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

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OCTOBER TERM, 1922.

LOUIS B. MACKENZIE, - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS COMPANY, - *Respondent.*

RESPONSE AND PETITION FOR A CROSS WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The respondent herein, A. Engelhard & Sons Company, in response to the petition of Louis B. Mackenzie, petitioner herein, for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, deems it improper and unnecessary at this time to call this court's attention to erroneous assumptions and statements contained in said petition, as to the facts disclosed by the record; and respectfully joins the said petitioner in asking a review of the judgment complained of and hereby respectfully petitions this Honorable Court for a cross writ of certiorari, to review the judgment of the United States Circuit Court of Appeals for the Sixth Cir-

cuit, covering both an appeal and a cross appeal to that court.

The cross writ is prayed pursuant to the practice approved in the case of

> *Deslions* v. *La Compagnie, Generale Transatlantique,* 210 U. S. 95; 52 L. Ed. 973.

The court refers to the practice as follows:

> "As the case is before us not only because of the allowance of a writ of certiorari applied for by the claimants, but also on a cross writ, asked on behalf of the petitioner, all the questions presented by the record or opinion, and, as far as they are essential, must be disposed of."

Your petitioner, A. Engelhard & Sons Company, respectfully shows to this Honorable Court as follows:

FIRST—(a) The rule of local law of the State of Kentucky with respect to supersedeas provides:

> "An appeal shall not stay proceedings on the judgment unless a supersedeas be issued."
>
> *Kentucky Civil Code of Practice,* Section 747.

(b) In its opinion and judgment the United States Circuit Court of Appeals for the Sixth Circuit failed and refused to follow said rule of local law as mandatory as will be seen by reference to the opinion of that court (record, page 57, in the middle of the page), where the court refers to the necessity for obtaining a supersedeas in order to stay proceed-

ings under a judgment simply as "customary precautions to preserve his interests."

(c) Such conflict between a State statute and a Federal court decision has been held by this court to call for the issual of a *writ of certiorari.*

Dupree v. *Mansur,* 214 U. S. 161, 53 L. Ed. 950.
Alice Bank, et al. v. *Houston,* 247 U. S. 240, 62 L. Ed. 1096.

SECOND—(a) The Court of Appeals of Kentucky has held in construing Section 747 of the Civil Code, that same is mandatory and that "upon principles of universal law, acts performed, and rights acquired by third persons under the authority of the judgment or decree, and while it remains in force, must be sustained, notwithstanding a subsequent reversal."

Fidelity Trust & Safety Vault Co. v. *Louisville Banking Company,* 119 Ky. 675.
Bridges v. *McAllister,* 106 Ky. 979.
Runyon v. *Bennett,* 4 Dana 598.
Hayes v. *Harding,* 25 Ky. L. Repr. 1454.
Hall v. *Smith, Etc.,* 162 Ky. 159.
Kaye v. *Kean,* 18 B. Monroe 839.
Clarke v. *Rodes,* 12 Bush 16.
Fraser's Exr. v. *Page,* 82 Ky. 73.
McKee v. *Smith's Admr.,* 5 Ky. Law Repr. 224.
Shultz v. *Beatty,* 6 Ky. Law Repr. 662.
Showalter v. *Simmons,* 5 Ky. Law Repr. 423.
Dudley v. *Beatty,* 5 Ky. Law Repr. 773.

(b) The United States Circuit Court of Appeals in its judgment in this case failed and refused to follow the construction placed on this Kentucky Stat-

ute by the Court of Appeals of the State of Kentucky, and in substance held that the action taken by the defendant corporation, respondent herein, while the judgment was in full force, and while no supersedeas had been issued, and though the action was entirely justified, if that judgment was correct, renders it liable to the plaintiff just as though a supersedeas had been applied for and issued.

(c) Such conflict between the decisions of the highest Court of the State and the Federal Court is held by this court to be reviewable by certiorari.

Northern Pacific, Etc. v. *Meese,* 239 U. S. 614, 60 L. Ed. 467.
Williams v. *Gaylord,* 186 U. S. 157, 46 L. Ed. 1102.

THIRD—(a) In its judgment, the Circuit Court of Apeals has failed and refused to follow the rule laid down by the Supreme Court of the United States, to the effect that as a judgment respects third persons "whatever has been done under the judgment while it remained in full force is valid and binding. A contrary doctrine would be extremely inconvenient and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future date be reversed, it would virtually, in many cases, amount to a stay

of proceedings on the execution. No such rule is necessary for the protection of the rights of the parties. The writ of error may be so taken out as to operate as a supersedeas."

Bank of United States v. *Bank of Washington*, 6 Peters, 8; 8 L. Ed. 299.
Insurance Company v. *Clarke*, 203 U. S. 75, 51 L. Ed. 96.
Deposit Bank of Frankfort v. *Frankfort*, 191 U. S. 499, 48 L. Ed. 276.
Crescent City, Etc. v. *Butchers Union, Etc.*, 120 U. S. 141, 30 L. Ed. 614.

(b) The effect of the ruling of the Circuit Court of Appeals in this case is that the Engelhard Company, a third party, is as liable for the action which it took and which was justified if the judgment of the State Circuit Court was correct, as if that judgment had been properly superseded.

Such conflict between the decisions of the Supreme Court and the Circuit Court of Appeals calls for the issual of a writ of certiorari.

Joplin Mercantile Co. v. *U. S.*, 236 U. S. 531, 59 L. Ed. 705.
Wright v. *Louisville, Etc.*, 236 U. S. 687, 59 L. Ed. 788.

R. A. McDowell,
Counsel for Petitioner.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON. } ss.

R. A. McDowell, being first duly sworn, says that he is counsel for A. Engelhard & Sons Company, the respondent and cross-petitioner herein; that he has read the foregoing petition for a cross writ of certiorari and that the statements contained therein are true.

R. A. McDOWELL.

Subscribed and sworn to before me by R. A. McDowell this 15th day of April, 1923. My commission expires December 22, 1926.

GLOVIE M. CHELF,
Notary Public, Jefferson County, Kentucky.

[SEAL]

BRIEF.

ORIGINAL STATE COURT SUIT.

May it Please the Court:

An action was brought by Mackenzie, the petitioner herein, against F. W. R. Eschmann, in the Jefferson Circuit Court of Kentucky, to recover judgment on a note for $7,500.00, and to enforce an alleged lien on One Hundred and Thirty (130) shares of stock in the Engelhard & Sons Company. After the case was duly argued and submitted, the State court entered a judgment in two parts.

First: Dismissing Mackenzie's petition.

Second: Permitting the defendant, Eschmann, to withdraw the certificate of stock free of lien.

Mackenzie thereupon only superseded the judgment insofar as court costs were concerned; but **did not supersede** the judgment permitting the defendant to withdraw this stock free of lien. Several months later the defendant, Eschmann, presented the certificate for One Hundred and Thirty (130) shares of stock to the corporation and directed that the shares be reissued, twenty-five (25) shares to his attorney, the other One Hundred and Five (105) shares to his wife. (The Circuit Court of Appeals says there is nothing to show that the purchasers were purchasers without notice. There is nothing in the record to show that they were or were not such purchasers. As a matter of fact, the wife was an

innocent purchaser.) The corporation, defendant in the United States District Court, and respondent herein, acting in good faith, relying upon the judgment permitting the withdrawal of the stock free of lien, without any right to refuse, acquiesced in Eschmann's request, and transferred the stock as directed. This is the act held to be wrongful; because of which damages are assessed.

Approximately two years later the Court of Appeals of Kentucky reversed the case. Directed a judgment for the $7,500.00 note with interest; **but said not one word regarding any alleged lien.** As will be seen by reference to the opinion of the Kentucky Court of Appeals, found on pages 31 to 36 of the transcript of the record herein.

The United States Circuit Court of Appeals, laboring under a grievously wrong impression, erroneously states in its opinion (see Record, page 56), referring to the Court of Appeals of Kentucky, "Accordingly it reversed the decree **sustained the lien upon the stock,** directed that Mackenzie should have judgment for his debt and **that his lien should be enforced by a sale of the stock.**"

We assert positively that the Court of Appeals **did not** "sustain the lien upon the stock," **did not direct** "that his lien should be enforced by a sale of the stock," and made no other mention of a lien. To sustain our positive denial of these erroneous assertions in the Circuit Court of Appeals' opinion, we respectfully refer this court to the opinion of the

Court of Appeals of Kentucky (Record, pages 31 to 36).

Had the Court of Appeals of Kentucky held, as to a lien, as stated by the Circuit Court of Appeals, an entirely different case would be presented. It is most important that this court should verify the facts by the record.

Nevertheless, when the case was returned from the Court of Appeals, the Jefferson Circuit Court directed that the stock be returned to court, but without waiting therefor or taking any step to secure jurisdiction over or control of the stock, that court (but without any direction from the Kentucky Court of Appeals) declared that the plaintiff had a lien thereon and directed its commissioner to sell the stock, over which neither the court nor commissioner had any control, to satisfy the alleged lien.

We insist that insofar as that court, without jurisdiction over or control of the property involved, adjudged a lien to plaintiff upon that property and directed the sale of the stock, its judgment was not merely erroneous, but absolutely void, as was the sale pursuant thereto.

Nesbitt v. *Macon Bank & Trust Co.*, 12 Fed. 686.
Jones on Pledges and Collateral Securities, 2nd Ed., Paragraph 40.
Harding v. *Eldridge*, 186 Mass. 39.
Casey, Receiver v. *Cavoroc*, 96 U. S. 467, 24 L. Ed. 779.
Story on Bailments, 6th Ed. Sec. 287.
31 *Cyc.* 817.

Pomeroy Equity Jurisprudence, 2nd Ed. Sec. 1233.
Third National Bank v. *Buffalo,* 193 U. S. 581, 48 L. Ed. 81.
Helborn v. *American Mercantile Corporation,* 167 New York Supp. 711, 180 Appeal Decision 167.
Hubbell Slack v. *Farmers, Etc.* 196 S. W. 681.
New Albany National Bank v. *Brown,* 114 N. E. 486.
Geilfus v. *Corrigan,* 37 L. R. A. (Wisc. 166), 16 R. C. L., page 49.

The United States Circuit Court of Appeals in its opinion herein complained of, as will be seen by the erroneous statement in that opinion just called to this court's attention, believed that the Court of Appeals of Kentucky had decided something that it did not decide; by reason of that belief the Circuit Court of Appeals failed to recognize the requirements of the statute law of Kentucky with reference to supersedeas. *Civil Code,* 747.

It is clear, therefore, that the Circuit Court of Appeals, in ignoring this statutory requirement did so under an erroneous impression as to what the Kentucky Court of Appeals decided; because Section 747 of the Civil Code is very definite and provides "An appeal shall not stay proceedings on a judgment unless a supersedeas be issued." Not only because of this conflict between the Federal Court and a State statute but also because of the erroneous impression of the Federal Court, this

court should review this case for which purpose it should issue its writ of certiorari.

Dupree v. *Mansur*, 214 U. S. 161, 53 L. Ed. 950.
Alice Bank, Et Al. v. *Houston*, 247 U. S. 240, 62 L. Ed. 1096.

SECOND PROPOSITION.

Again, the Court of Appeals of Kentucky being the highest court in this State has construed Section 747 of the Civil Code in numerous opinions and has been very clear and positive in its statements that it is mandatory that a judgment shall be superseded and until superseded such judgment carries full authority until reversed or superseded, notwithstanding the Court of Appeals has been asked to reverse it.

The respondent herein, the Engelhard Company, relied upon the statute referred to and the decisions of the State court construing that statute, as it had the right to do, and transferred the stock represented by the certificate which the lower State court directed might be withdrawn from court free of lien. Under the opinion, however, of the United States Circuit Court of Appeals for the Sixth Circuit, that court ignores the construction placed upon that statute by the numerous cases handed down by the Kentucky Court of Appeals and holds that the action of the Engelhard Company, respondent herein, perpetrated a wrong against Mackenzie and that court holds that, because of that act, the corporation must

pay thousands of dollars in damages to Mackenzie; although that court does not consider the act of the corporation as being a very great wrong, as it says, about the middle of page 57 of the record:

> "The surrender and reissue of the certificate did not occur under circumstances which made the act wrongful as against Mackenzie in the manner and degree to which such an act is ordinarily wrongful as against the owner. On the contrary, while Mackenzie did not directly acquiesce in the withdrawal of the certificate, he contributed to create the situation attending the withdrawal, surrender and reissue. To obtain a supersedeas would apparently have been no burden, and would have avoided all later complications; and while it may be assumed that the lien upon the stock was in law reinstated *ab initio* when the judgment was reversed, yet the intermediate transfer and reissue would not have occurred if Mackenzie had taken the **customary precautions** to preserve his interests."

Thus it will be seen that the Circuit Court of Appeals has given Mackenzie the full benefit and protection of a supersedeas, notwithstanding he did not apply for a supersedeas and none was issued, and instead of the Circuit Court of Appeals following the statute law of Kentucky and the decisions of the highest court of that State, the Circuit Court of Appeals waives the necessity for securing a supersedeas and refers to that act merely as a "customary precaution" instead of a **mandatory requirement,** which it is held to be by the highest court of the

State of Kentucky, as will be seen by reference to the following cases:

Fidelity Trust & Safety Vault Co. v. *Louisville Banking Company,* 119 Ky. 675.
Bridges v. *McAllister,* 106 Ky. 979.
Runyon v. *Bennett,* 4 Dana 598.
Hayes v. *Harding,* 25 Ky. L. Repr. 1454.
Kaye v. *Kean,* 18 B. Monroe 839.
Clarke v. *Rodes,* 12 Bush 16.
Fraser's Exr. v. *Page,* 82 Ky. 73.
McKee v. *Smith's Admr.,* 5 Ky. Law Repr. 224.
Shultz v. *Beatty,* 6 Ky. Law Repr. 662.
Showalter v. *Simmons,* 5 Ky. Law Repr. 423.
Dudley v. *Beatty,* 5 Ky. Law Repr. 773.

In the first case above cited, *Fidelity, Etc.* v. *Louisville Banking Company,* Ethridge withdrew money from the court, pursuant to a judgment of the court, which judgment was not superseded, though later reversed. After the reversal, an attempt was made to require the parties, to whom Ethridge paid the money, to return it to the court. The Court of Appeals held (again reversing the lower court) that Ethridge might be compelled to pay the parties who suffered by reason of the erroneous judgment; but those to whom Ethridge paid the money had the right to accept it as he had withdrawn it under the judgment which was perfectly valid, and the judgment had not been superseded. The case is in exact point and the same rule is held by the other cases to be the rule of law in Kentucky. Because this is the rule of law in Kentucky and held to be so by the highest court of the State of Kentucky, the United

States Circuit Court of Appeals was, in duty bound to follow this rule of law. Had it followed this rule of law, then it would have directed the United States District Court to dismiss the petition of Mackenzie against the A. Engelhard & Sons Company, that company having done nothing, which it was not justified in doing under the lower State court's judgment permitting the withdrawal of the certificate of stock from court free of lien.

We believe that this conflict between the Federal Court decision and the previous decisions of the highest court of the State and the failure of the Federal Court to follow those decisions justifies this court in issuing its writ of certiorari to review this case.

Northern Pacific, Etc. v. *Meese,* 239 U. S. 614, 60 L. Ed. 467.

Williams v. *Gaylord,* 186 U. S. 157, 46 L. Ed. 1102.

THIRD PROPOSITION.

We believe that because of the fact that the Supreme Court of the United States has, in several cases, laid down the same rule of law as was laid down by the highest court of the State of Kentucky the Circuit Court of Appeals should be required to conform to that rule.

Bank of United States v. *Bank of Washington,* 6 Peters 8; 8 L. Ed. 299.

Insurance Company v. *Clarke,* 203 U. S. 75, 51 L. Ed. 96.

Deposit Bank of Frankfort v. *Frankfort*, 191 U. S. 499, 48 L. Ed. 276.
Crescent City, Etc. v. *Butchers Union, Etc.*, 120 U. S. 141; 30 L. Ed. 614.

The above cases sustain the proposition that (quoting from the opinion in the first case above cited), "whatever has been done under the judgment while it remained in full force is valid and binding."

The action of A. Engelhard & Sons Company in transferring the stock upon the request of Eschmann was done while the judgment of the court remained in full force, and therefore was valid. We take it that it makes no difference whether the corporation had notice that Mackenzie had appealed this judgment or not. When it referred to the record and found the judgment had not been superseded it had the right to act under a subsisting judgment and was not required to await the outcome of the appeal unless Mackenzie had taken the required steps to secure the issuance of a supersedeas, and it is most unjust to require Engelhard Company to pay Mackenzie any sum whatever because of its perfectly legitimate action.

The law provided a way for Mackenize to protect his interests. He failed to do it. The highest court of the State of Kentucky has many times decided that the only way to suspend action under a judgment is by following the rule provided by the statute and the Supreme Court of the United States has just as emphatically held to the same rule.

The respondent is entitled to have this case reviewed by this court. Let it be understood that no right of the plaintiff, Mackenzie, petitioner herein, is cut off by failure to give him judgment against the defendant corporation, respondent herein, for the reason that if his lien was as stated by the United States Circuit Court of Appeals, "reinstated *ab initio*" when the judgment was reversed, then he still has the right to enforce his lien against the stock in the hands of the purchasers. By reference to the opinion of the Circuit Court of Appeals at the top of page 60, Transcript of Record, it will be seen that on this proposition the Circuit Court of Appeals was divided, and the court says, "As an original proposition, this would be forceful, but, to the majority of the court, the contrary seems to be settled."

We feel that the failure and refusal of the Circuit Court of Appeals, to follow the statute law of the State of Kentucky, to follow the decisions construing that law by the highest court of the State of Kentucky, and the failure and refusal of the Circuit Court of Appeals to follow the rule of law laid down by the Supreme Court of the United States, will justify this court in the exercise of its discretion in issuing a writ of certiorari to review the decision of the United States Circuit Court of Appeals of the Sixth Circuit herein complained of.

Respectfully submitted,

R. A. McDowell,

Counsel for A. Engelhard & Sons Co.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

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LOUIS B. MACKENZIE, - - - - - - *Petitioner,*

vs.

A. ENGELHARD & SONS CO., - - - *Respondent.*

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A. ENGELHARD & SONS CO., - - - - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - - - - *Respondent.*

On Writs of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

Brief for A. Engelhard & Sons Company,

CROSS-PETITIONER AND RESPONDENT.

J. VERSER CONNER,
PERCY N. BOOTH,
Counsel for A. Engelhard & Sons Company.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

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LOUIS B. MACKENZIE, - - - - - *Petitioner,*

vs.

E. ENGELHARD & SONS COMPANY, - *Respondent.*

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A. ENGELHARD & SONS COMPANY, - *Petitioner,*

vs.

LOUIS B. MACKENZIE, - - - - - *Respondent.*

ON WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR A. ENGELHARD & SONS COMPANY,

CROSS-PETITIONER AND RESPONDENT.

These cases originated in the District Court of the United States, for the Western District of Kentucky, in an action brought by Louis B. Mackenzie against A. Engelhard & Sons Company, the jurisdiction of the Federal Court being based upon diversity of citizenship (R. 1). From a judgment in that court granting to Mackenzie a part of the relief

prayed by Mackenzie, both parties appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 38).

The Circuit Court of Appeals remanded the case to the District Court with directions to modify the judgment in certain particulars (R. 44-286, F. 813). Mackenzie thereupon petitioned this Court for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals, and A. Engelhard & Sons Company filed a cross petition for a cross writ of *certiorari* to review said judgment. This court sustained both petitions and issued writs of *certiorari,* both on the original petition of Mackenzie therefor (R. 47), and on the cross petition of A. Engelhard & Sons Company therefor (R. 46, 262 N. S. 739).

In this action, Mackenzie seeks to recover of A. Engelhard & Sons Company, a corporation, some $30,000.00 by reason of the refusal of A. Engelhard & Sons Company to recognize Mackenzie as a stockholder in said corporation. Mackenzie claims to be a stockholder by reason of alleged purchase of stock at a judicial sale, the purchase price being $100.00.

STATEMENT OF THE CASE.

It is somewhat difficult to ascertain exactly what act of the Engelhard Company is relied on as constituting an actionable wrong. The District Court and the Circuit Court of Appeals differed both as to the nature of the wrong and as to the extent of the corporation's liability therefor. An expression in

the opinion of the Circuit Court of Appeals indicates a difference among the judges of that court as to the existence of any liability.

The facts are to be found in the agreed stipulation of the parties (R. 14-20), and may be summarized as follows:

1. December 10, 1912, Mackenzie, plaintiff herein, presented to the defendant, A. Engelhard & Sons Company certificate No. 24 for 130 shares of its capital stock issued to and standing in the name of F. W. R. Eschmann, and Mackenzie sought to have said stock transferred on the corporate books to his name, and a new certificate issued to him. The stock was not endorsed by Eschmann, the owner, and therefore the corporation refused to make the transfer (R. 15).

STATE COURT SUIT.

2. March 10, 1913, Mackenzie *instituted an action* in the Jefferson Circuit Court (a State court of general equity jurisdiction) wherein he sought to recover of the defendant therein, Eschmann, on a promissory note, the sum of $7,500.00 and sought to enforce a lien on certificate No. 24 for 130 shares of the capital stock, of A. Engelhard & Sons Company, which he claimed had been pledged with him by Eschmann to secure the payment of the note (R. 15).

3. June 7, 1913, Mackenzie's *petition was dismissed* insofar as it was directed against the *Engel-*

hard Company and that company was never thereafter a party to the State court action (R. 16).

4. November 7, 1914, the State court *rendered a judgment for defendant, Eschmann;* dismissed the plaintiff's petition, and held that the note had been secured from Eschmann by fraud; that Mackenzie, who had purchased same from his friend and associate, Patterson, was fully conversant with the fraud, and directed that the certificate of stock be delivered to Eschmann (R. 16; opinion of Circuit Court, R. 20; judgment of Circuit Court, R. 23).

5. Mackenzie *did not supersede* this judgment or take any steps to stay its enforcement (R. 17).

6. January, 1915, after waiting more than two months for Mackenzie to appeal or execute a supersedeas bond, Eschmann *withdrew the certificate* of stock from court (R. 17).

7. *February 20, 1915, three and one-half months after it was adjudged that Mackenzie had no lien on the stock and before Mackenzie had taken any steps to perfect his appeal, Eschmann endorsed certificate No. 24, presented same to the Engelhard Company and directed that it be transferred—25 shares to R. A. McDowell, his lawyer, in payment of his fees, and 105 shares to Eschmann's wife, Bettina Eschmann. It was so transferred (R. 17). McDowell transferred his 25 shares to V. H. Engelhard, president of the defendant corporation for $2,500.00 cash.*

8. April 26, 1915, Mackenzie *filed the record* of said action in the Court of Appeals of Kentucky, thus

for the first time *perfecting his appeal* or showing any real purpose so to do (p. 18).

Under the Kentucky Statutes Mackenzie could have taken this appeal by filing the record in the office of the Clerk of the Court of Appeals at any time within two years from the date of the judgment. Kentucky Civil Code, Sec. 734 and 745.

9. March 6, 1917, the Court of Appeals of Kentucky *reversed the judgment* of the Jefferson Circuit Court (p. 18; opinion of the Court of Appeals, p. 24). Without disagreeing with the finding of the lower court as to the fraud which had been practiced upon Eschmann, or as to Mackenzie's knowledge thereof, the Court of Appeals held that Eschmann's son, and agent, with full knowledge of the fraud, condoned it and elected to abide by the contract (p. 27). Nothing was decided by the Court of Appeals as to any lien claimed by Mackenzie on the stock; and the Circuit Court of Appeals erred in holding that the Kentucky Court of Appeals had sustained said lien (p. 41).

10. October 31, 1917, *the Jefferson Circuit Court rendered judgment* that Mackenzie recover of Eschmann's estate $7,500.00 and further adjudged that Mackenzie had a lien on certificate No. 24 for 130 shares of the capital stock of A. Engelhard & Sons Company and ordered said certificate to be sold to enforce said lien (p. 18).

11. July 15, 1918, the Commissioner of the Jefferson Circuit Court, pursuant to said judgment, *undertook to sell certificate No. 24 at public sale* and

Mackenzie became the purchaser thereof for the sum of $100.00, which was credited upon his judgment against Eschmann (p. 19) and the Commissioner issued to Mackenzie a bill of sale on December 7, 1918 (p. 29).

12. April 29, 1919, Mackenzie *presented the bill of sale* to the Engelhard Company and demanded that said company issue a certificate to him for 130 shares of its capital stock (R., p. 19), but the company refused to issue same, because it had already, on February 20, 1915, more than four years before, cancelled said certificate No. 24, and issued said stock to Mrs. Bettina Eschmann and R. A. McDowell; and all of the capital stock, which it was authorized by its charter to issue, was issued and outstanding (R., p. 19).

THE DISTRICT COURT OF THE UNITED STATES.

13. Conceiving his rights to have been violated by reason of the facts above set out, Mackenzie filed his petition in equity in the District Court of the United States for the Western District of Kentucky against A. Engelhard & Sons Company as the sole defendant, and prayed that the corporation be required to issue to him a certificate for 130 shares of its capital stock or to pay to him the value of said stock plus all dividends declared thereon since July 15, 1918, the date when Mackenzie claimed to have acquired the title at a judicial sale (p. 1).

14. Judge Evans, in the District Court first overruled a motion to dismiss the petition for want of equity (p. 5); and the defendant filed an answer (p. 7); and an amended answer (p. 11); and a stipulation of agreed facts (p. 14). Judge Evans decided that plaintiff, Mackenzie, was entitled to recover (p. 31) *and fixed the amount of the recovery* (p. 35) at the amount of the debt owed by Eschmann to Mackenzie, to wit, $7,500.00, with interest, plus the dividends declared by the Engelhard Corporation since the execution and delivery of the bill of sale by the Commissioner of the Jefferson Circuit Court, the total recovery being $13,354.75.

PROCEEDINGS IN CIRCUIT COURT OF APPEALS.

15. Both parties assigned error (p. 36-37), and appealed to the Circuit Court of Appeals for the Sixth Circuit (p. 38), which court modified the judgment of the District Court and remanded the case to the District Court for a decree in conformity with the opinion of the Circuit Court of Appeals (p. 40). The Circuit Court of Appeals held that the corporation was liable to Mackenzie *for the amount of his debt and interest* (p. 44); but disallowed the dividends allowed by the District Court.

Though the Circuit Court of Appeals sustained Mackenzie's claim, it made the following findings which we think fatal to that claim: That Eschmann had a perfect right to transfer the stock to his wife

and McDowell in February, 1915, and that if the corporation had refused to transfer same at the request of Eschmann, a court of equity would have compelled it so to do. We quote from the opinion:

> "In view of the pending litigation as to the existence of Mackenzie's interest (fol. 58) and the undisputed existence of substantial interest in Eschmann, *it would seem that a court would have compelled the issue of a new certificate to Eschmann's nominees,* if that certificate should have had endorsed upon it a memorandum that it was subject to whatever lien Mackenzie might establish. *The wrong done to Mackenzie was therefore the issuing of the new certificate in such a way that it might reach a bona fide purchaser and so perhaps cut off Mackenzie's lien, but the wrong did not extend to the entire value of the stock, since Mackenzie had therein no interest to be injured except to the extent of his lien.*"

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES.

16. Mackenzie filed a petition for a writ of *certiorari* April 27, 1923, and same was sustained and the writ issued July 1, 1923 (p. 46). A. Engelhard & Sons Company filed a cross-petition for a writ of *certiorari* May 4, 1923, and same was sustained and the writ issued July 7, 1923 (p. 262 N. S. 739).

ASSIGNMENTS OF ERROR.

The assignments of error (R. 36-37), raise the question of the liability of Engelhard Company.

QUESTIONS INVOLVED.

The precise questions involved may be briefly stated.

If the defendant corporation is liable, it is because it has violated some duty, which it owed to Mackenzie. The corporation's sole connection with this case consists of its refusal on two occasions to transfer the stock to Mackenzie, and its act on another occasion in transferring the stock to the nominees of Eschmann. Which of these actions constituted the wrong?

First. Did A. Engelhard & Sons Company owe a duty to Mackenzie to transfer the stock to Mackenzie when he presented a certificate in December, 1912, standing in the name of F. W. R. Eschmann, and which certificate was not endorsed by Eschmann?

Second. On February 20, 1915, when Eschmann presented the certificate of stock to the corporation, properly endorsed, and asked that it be transferred, did the corporation owe Mackenzie the duty to refuse to transfer it? Eschmann owned the stock and the corporation was not justified in refusing to transfer it upon his request, unless its knowledge of Mackenzie's claim was such as to impose a duty on the corporation to refuse to make the transfer.

Third. After Engelhard & Sons Company had cancelled Certificate No. 24 and issued certificates for the one hundred and thirty shares to other par-

ties on February 20, 1915, did it owe a legal duty to Mackenzie to issue a certificate for one hundred and thirty (130) shares to him when he presented the purported bill of sale on April 20, 1919?

Certain important circumstances, if borne in mind, will serve to differentiate many of the authorities cited on the other side, and will aid the court in arriving at a conclusion.

1. MACKENZIE DID NOT CLAIM TO OWN THE LEGAL TITLE TO THE STOCK, BUT ONLY CLAIMED A LIEN THEREON, AT THE TIME THE STOCK WAS TRANSFERRED TO OTHERS.

2. AT THE REQUEST OF ESCHMANN, THE TRUE OWNER, THE STOCK WAS TRANSFERRED ON THE CORPORATE BOOKS FEBRUARY 20, 1915, THREE AND ONE-HALF MONTHS AFTER THE JEFFERSON CIRCUIT COURT HAD ADJUDGED THAT MACKENZIE HAD NO LIEN, AND WHILE THAT JUDGMENT WAS IN FULL FORCE AND NOT SUPERSEDED.

3. THE BASIS OF THE CORPORATION'S LIABILITY, IF ANY, IS ITS KNOWLEDGE OF MACKENZIE'S CLAIM. WITHOUT SUCH KNOWLEDGE NO LIABILITY COULD ATTACH FOR TRANSFERRING THE STOCK PURSUANT TO THE DEMAND OF THE REAL OWNER. ITS ONLY KNOWLEDGE WAS THAT MACKENZIE HAD CLAIMED A LIEN WHICH THE COURT HAD DENIED.

4. THE ORIGINAL DEBT FROM ESCHMANN TO MACKENZIE IS NOT HERE INVOLVED. MACKENZIE HAS PROVED THAT CLAIM WITH ESCHMANN'S ADMINISTRATORS, BY WHOM IT WILL NO DOUBT BE PAID IF IT HAS NOT ALREADY BEEN PAID. BY THIS ACTION, MACKENZIE SEEKS TO RECOVER JUDGMENT AGAINST THE CORPORATION, THE COLLECTION OF WHICH WILL NOT AFFECT THE CLAIM AGAINST ESCHMANN'S ESTATE.

FIRST POINT.

Refusal to Transfer December 10, 1912.

The first act on the part of the corporation which is complained of is its refusal to transfer the stock to Mackenzie on December 10, 1912, before any suit was brought. Mackenzie, on December 10, 1912, presented to the corporation certificate No. 24 of its capital stock. The certificate bore this endorsement:

> "This certifies that F. W. R. Eschmann is entitled to one hundred and thirty shares of the capital stock of A. Engelhard & Sons Company, transferrable only in person or by attorney on the books of the company, *upon the surrender and proper endorsement* of this certificate" (R., p. 15).

The certificate was not endorsed, and therefore the corporation refused to transfer it. That its refusal under the circumstances was justified, will not

perhaps be questioned. *Tafft* v. *Presidio, Etc., R. R. Co.*, 84 Cal. 131, 24 Pac. 436.

> "If the corporation takes up the old certificate when it is not properly endorsed, and cancels it and makes the transfer on its books to the new transferee, it does so at the peril of having to answer in damages to the real owner of the shares for their conversion in case the transferee had no right to have the transfer made to him."

See *Allmon* v. *Salem Building & Loan Association*, 114 N. E. 170.

We take it that there will be no question raised, but that the corporation was justified in refusing to transfer the stock to Mackenzie on December 10, 1912.

This brings us to the next act done by the corporation, to wit, its action in transferring the stock to McDowell and Mrs. Eschmann, on February 20, 1915, at which time the certificate properly endorsed by Eschmann was presented to the corporation, and the transfer was made at Eschmann's direction.

SECOND POINT.

Transfer February 20, 1915.

BOTH THE CORPORATION AND THE TRANSFEREES WERE ENTITLED TO RELY ON THE JUDGMENT DENYING ANY LIEN TO MACKENZIE AND NEITHER THE CORPORATION NOR TRANSFEREES CAN BE PREJUDICED BY A SUBSEQUENT REVERSAL OF THAT JUDGMENT. THE JUDGMENT PROTECTS RIGHTS ACQUIRED AND ACTS DONE PURSUANT TO IT EVEN THOUGH IT WAS REVERSED AFTER THE ACTS WERE DONE AND RIGHTS ACQUIRED.

It will be recalled that the Jefferson Circuit Court entered a judgment on November 7, 1914, in which it decreed that Mackenzie had no cause of action against Eschmann and no lien on the stock in question, and in which it directed that the certificate of stock be delivered to Eschmann (p. 23). More than two months thereafter, and in January, 1915, Eschmann withdrew the certificate of stock from court, and more than three and one-half months thereafter, to wit, February 20, 1915, Eschmann presented the certificate to the corporation and demanded its transfer. Is the corporation liable for making such transfer? If it is, its liability is, of course, wholly dependent upon its knowledge of the litigation between Mackenzie and Eschmann.

Section 747 of the Civil Code of Kentucky:

> "An appeal shall not stay proceedings on a judgment unless a supersedeas be issued."

By the judgment of November 7, 1914, Mackenzie's lien on the stock had been destroyed. Eschmann was then the owner of the legal title and the title was, by reason of the judgment of the Jefferson Circuit Court, free of lien. Being free of lien, he could transfer an unencumbered title to any purchaser, though a purchaser with notice of that litigation.

We shall assume for the purpose of this brief, that Mrs. Eschmann had knowledge of Mackenzie's claim, as that is the contention of Mackenzie's counsel.

If Mrs. Eschmann and Mr. McDowell acquired a good title to the stock transferred to them, in spite of their knowledge of the suit, then no liability can possibly attach to the corporation for transferring the stock because its knowledge was the same as that of the transferees. On the other hand, if for any reason the transfer was voidable, Mackenzie has not been damaged and the corporation is not liable.

The transferees who took while the judgment of the Jefferson Circuit Court was in effect, took a good title.

Fidelity Trust & Safety Vault Company v. *Louisville Banking Company*, 119 Ky. 675.

Creditors sued the Etheridge Manufacturing Company and levied attachments upon its property. Etheridge, a stockholder and officer of the company, asserted in the creditors' action a mortgage lien, claimed to be superior to the lien of the attaching creditors.

The circuit court adjudged the lien of Etheridge to be superior to the liens of the attaching creditors, and Etheridge, through his attorneys, withdrew the money from court. His attorneys retained a part of the fund for their services and the balance was distributed to other creditors of Etheridge, who had knowledge of the fund from which it was being paid. The attaching creditors appealed to the Court of Appeals of Kentucky and that court reversed the lower court and held that the attaching creditors had a right to the money, their liens being superior to that of Etheridge.

The attaching creditors then sought to make Etheridge's attorney, and his other creditors who had received the money with knowledge of the source from which it came, pay said money into court to be subjected to the attachments. The Court of Appeals on a second appeal held that Etheridge's attorneys and creditors had acquired a good title to the money, which was superior to the liens of the attaching creditors. The contention of the attaching

cerditors is stated by the Court of Appeals as follows:

> "It is the contention of appellee's that they had a lien upon the $6,900 in question, and that the circuit court erroneously adjudged the money to Etheridge, but they contend that such judgment did not destroy or annul their several liens; and inasmuch as the court of appeals reversed the judgment, and adjudged that the lien of the attaching creditors was superior to that of Etheridge, that the lien in fact and in law existed on the fund all the time; hence they argue that these appellants having received that identical money, that they were in law bound to repay the same under and in accordance with the rules issued as aforesaid."

The contention of the attorney for Etheridge and his other creditors who had received the fund, is thus stated:

> "And it is further contended that inasmuch as Etheridge, under the judgment of the trial court in the original case, was adjudged the money and the same paid to him, and by him to these appellants as aforesaid, that they are under no legal obligation to refund the same, and that the attaching creditors must look alone to Etheridge."

The case seems to us identical in principle with the one at bar. The lien of the attaching creditors was held to be ineffective and the fund delivered to Etheridge free of lien. In the case at bar it was held that Mackenzie had no lien on the stock, and the certificate was delivered to Eschmann. Etheridge paid

the money to his creditors who had knowledge of the suit. Eschmann delivered the stock to persons having knowledge of the suit. The Court of Appeals in reversing the Etheridge case, held that the attaching creditors' lien was good just as the Circuit Court upon reversal in this case held that Mackenzie's lien was good. In neither case can the right arising from the subsequent judgment after reversal affect the rights of third persons though with notice.

This case is sought to be distinguished because money is negotiable and certificates of stock are not negotiable. The distinction must fail for two reasons: First, the negotiability of the thing transferred is wholly unimportant in either case because in both cases the transferees had knowledge of the facts. A transferee of a negotiable instrument having knowledge of the facts relied on to defeat his title takes no higher title than a transferee of a non-negotiable instrument. Second, the Court of Appeals of Kentucky distinctly held in the Etheridge case that the negotiability of the fund had nothing to do with the decision.

> "If, instead of the $6,900 being in money, there had been a contest between Etheridge and the other attaching creditors as to a lien upon personal property, for instance, horses and cattle, then in the custody of the court's receiver, and the court had denied any lien to the attaching creditor and adjudged the property to Etheridge, *it would seem that he could sell it and pass good title thereto at any time while such judgment was in force.*"

That language of the Court of Appeals fits this case precisely.

The Court of Appeals concluded:

> "The duty of Etheridge to refund the money is not disputed and it seems to us that these appellees must look alone to Etheridge for relief or restitution."

Mackenzie claimed a lien by virtue of a pledge. Had there been no pledge and had he simply instituted suit upon the note he could have procured an attachment and acquired a lien on this stock by serving the corporation as garnishee (Civil Code of Ky. 203). Had the petition been dismissed, as it was, the transferees of the stock would have taken good title. The case would then have been absolutely identical with the Etheridge case. We submit that no logical distinction can be made between a lien claimed by virtue of an attachment and a lien claimed by virtue of a pledge, in so far as the rights of third persons are concerned, acquired in reliance on a judgment denying the existence of the lien.

The Bank of United States v. *Bank of Washington,* 6 Peters (8 U. S.), 19, 8 L. Ed. 299.

Triplett & Neale recovered a judgment against the Bank of Washington, and being indebted to the Bank of the United States authorized the Bank of the United States to collect the amount of the judgment from the Bank of Washington, and to credit

the amount collected upon the indebtedness of Triplett & Neale to the Bank of the United States.

The Bank of Washington paid the fund to the Bank of the United States, but notified the Bank of the United States when so doing that it was its purpose to appeal from the judgment and that if the case should be reversed, it would look to the Bank of the United States to refund the money. The case was reversed and the Bank of Washington undertook to recover the sum paid to the Bank of the United States, but this court held that no such recovery could be had, using this language:

> "That the Bank of Washington, on the reversal of the judgment of Triplett & Neal, is entitled to restitution in some form or manner is not denied. The question is whether recourse can be had to the Bank of the United States, under the circumstances stated in the case agreed. When the money was paid by the Bank of Washington, the judgment was in full force, and no writ of error allowed, or any measures whatever taken, which could operate as a supersedeas or stay of the execution. Whatever, therefore, was done under the execution towards enforcing payment of the judgment, was done under authority of law."
>
> * * * * * * *
>
> "If the marshal might have sold the property of the bank and given a good title to the purchaser, it is difficult to discover any good reason why a payment made by the bank should not be equally valid, as it respects the rights of third persons. In neither case does the party against whom the erroneous judgment has been enforced, lose his remedy against the party to the judg-

ment. On the reversal of the judgment, the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution without a *scire facias,* when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a *scire facias* may be necessary to ascertain what is to be restored. (2 Salk. 587; Tidd's Prac. 936, 1137, 1138). And, no doubt, circumstances may exist where an action may be sustained to recover back the money. (4 Cowen, 297.) *But as it respects third persons, whatever has been done under the judgment whilst it remained ni full force is valid and binding. A contrary doctrine would be extremely inconvenient, and in a great measure tie up proceedings under a judgment during the whole time within which a writ of error may be brought. If the bare notice or declaration of an intention to bring a writ of error will invalidate what is afterwards done, should the judgment at any future day be reversed, it would virtually, in many cases, amount to a stay of proceedings on the execution. No such rule is necessary for the protection of the rights of parties.* The writ of error may be so taken out as to operate as a supersedeas. Or, if a proper case can be made for the interference of the Court of Chancery, the execution may be stayed by injunction."

On the question of notice, the Court used this language:

"But the answer to the argument is that no notice whatever could change the rights of the

parties, so as to make the Bank of the United States responsible to refund the money. *When the money was paid there was a legal obligation on the part of the Bank of Washington to pay it, and a legal right on the part of Triplett & Neale to demand and receive it, or to enforce payment of it under the execution. And whatever was done under the execution, whilst the judgment was in full force, was valid and binding on the Bank of Washington SO FAR AS THE RIGHTS OF STRANGERS OR THIRD PERSONS ARE CONCERNED. The reversal of the judgment cannot have a retrospective operation, AND MAKE VOID THAT WHICH WAS LAWFUL WHEN DONE.* The reversal of the judgment gives a new right or cause of action against the parties to the judgment, and creates a legal obligation on their part to restore what the other party has lost by reason of the erroneous judgment; and as between the parties to the judgment there is all the privity necessary to sustain and enforce such right; but as to strangers there is no such privity, and if no legal right existed when the money was paid to recover it back, no such right could be created by notice of an intention so to do."

The court points out forcefully that certain methods are provided by which litigants may stay proceedings under judgments pending appeals and that in the absence of such stay, persons acting pursuant to said judgments are protected and subsequent reversals do not affect their rights. Otherwise no one could safely rely on any judgment until the time for appeal, which in some cases is as long as twenty years, has expired. See Ky. Civil Code 745.

That language of this court meets every contention advanced in this case. Admitting that McDowell and Mrs. Eschmann knew of the litigation, the fact is that they took title at a time when the title of Eschmann to the stock was free from encumbrance by virtue of the judgment of the Jefferson Circuit Court. The notice, therefore, that Mackenzie might appeal and get that judgment reversed could not be made to take the place of a supersedeas bond. When the case was reversed and the new judgment entered, Mackenzie acquired a perfectly valid right as against Eschmann, but no right as against Eschmann's transferees.

A more recent decision of this court illustrates the same principle.

Fidelity Mutual Life Insurance Company v. *William H. Clarke,* 203 U. S. 64, 51 L. Ed. 91; opinion by Justice Holmes.

Mrs. Mettler sued the insurance company to recover on a policy of insurance issued by the company upon the life of one Hunter. The insurance company defended upon the ground that Hunter was not dead. Mrs. Mettler assigned parts of her interest in the policy to her counsel in the case and to other persons. Judgment being rendered in favor of Mrs. Mettler, the insurance company paid the money into court and it was turned over to the several persons entitled thereto, including Mrs. Mettler, her attorney, and others.

The insurance company then learned that Hunter, the insured, was alive, and that the claim had been made by fraud and the company sought to upset the judgment because it was procured by fraud, and to recover the money paid thereunder to Mrs. Mettler and her assignees.

The court assumed for the sake of the opinion that the judgment could be set aside for fraud, but held that the assignees of Mrs. Mettler were entitled to retain the money received, saying:

> "We are of opinion that appellees are entitled to keep their money, even if the judgment can be impeached for fraud."

In passing on the case the court used this language:

> "They all got the legal title to the money which was paid to them, or, what is the same thing, got the title transferred to their order; that being so, the appellant must show some equity before their legal title can be disturbed."

So in the case at bar, Mr. McDowell and Mrs. Eschmann acquired legal title and the question is, can their title be impeached by reason of their notice of the pending suit? As to that notice the court said:

> "The appellant is driven, therefore, to contend as it did contend at the argument, that notice of the denial that Hunter was dead, in the suit on the policy, was notice of the fraud. But it is admitted that the appellees all acted in good

faith; that they believed the plaintiff's case. In such circumstances, even if the answer had gone further, and had charged the plaintiff with all that the present bill charges against her, when a jury had decided that the charges were groundless, a judgment had been entered on the verdict, and the insurance company had accepted the result by paying the money into court without waiting for an execution, *it would be impossible to say that the supposed notice was not purged.* The appellees were not bound to contemplate future discoveries of what they honestly believed untrue, and a bill to impeach the final act of the law. See Bank of United States v. Bank of Washington, 6 Peters, 8, 19, 8 L. Ed. 299, 304."

So here. The only notice chargable to McDowell and Mrs. Eschmann was notice that Mackenzie had claimed a lien which had been held invalid by the court. They did not know that that judgment was erroneous and would be reversed. In the insurance case, the recipients of the fund knew that the insurance company claimed the insured was not dead, but they did not know that to be a fact.

The insurance company contended in that case, as Mackenzie contends here, that the title of the transferees to the money depended upon a judgment and that as the judgment must fail because of fraud, therefore the title based thereon must fail. The court answered that contention in this language.

"It is said that the title of the appellees stands on the judgment, and that if the judgment fails the title fails. But that mode of statement is not sufficiently precise. The judgment hardly

can be said to be part of the appellee's title. It simply afforded the appellant a motive for its payment into Court. The appellees derive their title immediately from Mrs. Mettler, and remotely from the act of the appellant. They stand exactly as if the appellant had handed over the $24,000.00 in gold to her and she thereupon had handed their proportion to them. We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler. We are insisting only that the title had passed to them. But we repeat that, as the title had passed, the appellant must find some equity before it can disturb it, and we now add that, as there is no question that the appellees took for value, that is, in payment for their services, or, if it be preferred, in performance of Mrs. Mettler's contingent promise, the equity must be founded upon notice.

"The notice to be shown is notice of the fact that the judgment which induced the appellant's payment was obtained by fraud."

That case is sought to be distinguished from the case at bar on the ground that it was money that was transferred but Mr. Justice Holmes pointed out, as did the Kentucky Court of Appeals, in the Etheridge case, that the fact of the thing being money was of no significance as the parties took with notice.

"We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler."

We take it that the case is not to be distinguished because the judgment was attacked for fraud whereas in the case at bar the judgment was simply erroneous and reversed. In both instances, the judgment fails.

Referring again to the case of *Fidelity Trust & Safety Vault Company* v. *Louisville Banking Company,* 119 Ky. 675, we call the court's attention to the following quotation, quoted by the Kentucky Court, from an opinion by the New York Court in the case of *Langley* v. *Warner,* 3 N. Y. 327.

> "The case then comes to this: The money in question, in the regular course of judicial proceedings, came to the hands of the defendant as the attorney of Walsh; and on the subsequent settlement between them the money was passed to the creditor, Walsh, on account of his indebtedness to the defendant. It was the same thing in effect as though the defendant had first paid over the money to Walsh, and the latter had then repaid it to the defendant in satisfaction of his debt. About two months afterwards the judgment was reversed and restitution was awarded to the plaintiffs against Walsh. It was very proper that he should make restitution for he had in effect received the money and applied it to the payment of his debt. The plaintiffs proceeded to execution against Walsh, in pursuance of the judgment for restitution, but failing in that, they now seek to recover the amount from the defendant. I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money; he has got nothing but his own. Walsh had a perfect title to the money when it was collected, just as per-

fect as it would have been if no *certiorari* had been issued. He had a right to do what he pleased with the money; and he made a very proper use of it by paying his debt. *The plaintiffs have taken up the strange notion that because they were trying to get the judgment reversed, Walsh could not give a good title to the money, especially if he paid it to one who knew what they were doing. I am not aware of any foundation for such doctrine. As Walsh had a good title to the money he could, of course, give a good title to the defendant, or any one else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous and would be reversed. The legal presumption was the other way—that the judgment was right and would be affirmed."*

Wood's Administrator v. *Nelson's Administrator,* 9 B. Monroe, 600.

A judgment of the Probate Court admitted a will to probate. While proceedings were pending in the Circuit Court to reverse the judgment admitting the will to probate, the executor appointed by the will sold certain slaves under authority of the will, and thereafter the judgment probating the will was reversed. The court held that both the executor and the purchaser of the slaves were protected by the probate judgment, saying:

"The general principle with regard to the validity of acts done under a valid judgment, while it remains in force and unsuspended is, that they are not invalidated by a subsequent reversal. And this principle has been considered as being essential to the safety of the community, and as

due to the confidence which they have a right to repose in the efficacy and authority of judicial proceedings."

The text writers sustain the rule:

37 Cyc. 602:

"Whatever is lawfully done under the judgment before the supersedeas takes effect is valid, and must stand."

The same proposition is laid down in 2 Ruling Case Law, page 273, paragraph 226:

"General Effect of Reversal as to Third Persons—When the court has jurisdiction of the parties and the subject-matter, *acts performed and rights acquired by third persons under its judgment or decree must be sustained, notwithstanding a subsequent reversal.* Thus the reversal of a judgment appointing a syndic, or receiver, does not operate retrospectively, and avoid his acts done while the judgment was in force. So, where a judgment is not superseded pending an appeal or writ of error, an execution may lawfully issue thereon, the officer is justified in proceeding regardless of the proceeding for review and is not deprived of the protection of his process by the subsequent reversal of the judgment. *Where by virtue of a judgment a party in whose favor it was rendered receives money, which he subsequently pays over to his creditors, upon reversal the latter cannot be required to make restitution.*"

Under the heading "Restitution on Reversal," the same text-book on page 291, Sec. 245, says:

"The general principle is well settled that a subsisting judgment of a court which had juris-

diction of the parties and subject-matter is binding, at least on all who were parties; and constitutes a sufficient justification for all acts done in its enforcement until it is reversed or set aside by competent authority."

Consequently Mackenzie was bound by the judgment of the court permitting Eschmann to withdraw the stock and his alleged lien was lost thereby. His only chance to save it was to supersede that judgment.

Hey v. *Harding,* 25 Ky. L. Rep. 1454, 78 S. W. 136.

Hey sued Harding on a note and attached certain horses belonging to Harding, thus acquiring a lien on the horses. The horses were sold before judgment in the lower court and Mrs. Harding, defendant's wife, became the purchaser and executed bond for the purchase price.

June 13, 1896, the lower court decided the case in favor of Harding and discharged the attachment. Harding in exactly one week, to wit, June 20, 1896, entered an order acknowledging satisfaction of the sale bond executed by his wife.

July 9, 1896, less than one month from the date of the judgment Hey executed a supersedeas bond and took the case to the Court of Appeals, which reversed the judgment and directed that judgment go against Harding and *that the attachment be sustained.*

The attachment being sustained, of course Mrs. Harding was liable on the bond, except for the fact that she had been released therefrom by her husband before the judgment was superseded. The court held that the judgment of the lower court destroyed the lien of the attachment and that Harding had a perfect right, therefore, to release the purchase money bond as the judgment was not superseded at the time of his release. The case would have been precisely the same had the horses not been sold under the attachment but had been sold and delivered to Mrs. Harding by her husband between the time the lien was discharged and the time the supersedeas bond was executed. The court said:

> "Section 747. An appeal shall not stay proceedings on the judgment unless supersedeas be issued.
>
> "The judgment discharging the attachment under Section 228 of the Code, entitled Harding to the return of the attached property, or its proceeds. If appellant desired to prevent this from being done, it was incumbent upon him to supersede the judgment. Having failed to do this, Harding became entitled to the proceeds of the sale of the attached horses. As this was made to him before the supersedeas, the appeal of the supersedeas afterwards had no retroactive effect upon the validity of the payment. In the case of Runyon v. Bennett, 4 Dana, 598, it was said: 'A supersedeas suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation

such as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is, that whatever is done under the judgment, after and while it is superseded being done without authority from the judgment which is then powerless and against the authority and mandate of the supersedeas should be set aside as improperly and irregularly done; *but that whatever is done according to the judgment before the supersedeas takes effect is upheld by the authority of the judgment and is not overreached by the supersedeas.*"

See also *Garret* v. *Jensen* (Cal.), 186 Pac. 156.

In other words, it is the rule in the Court of Appeals of Kentucky, and it is the rule in the Supreme Court of the United States, and in many of the State courts, that if the judgment discharges a lien the owner of the property pending an appeal without supersedeas can transfer same to a purchaser who will take a good title free of the lien.

If the plaintiff who claims the lien wants to retain his rights he must execute a supersedeas bond. The courts in the above quotations have pointed out how inconvenient a contrary doctrine would be. To hold to the contrary in this case amounts to a holding that in spite of the successful termination of the action in the lower court, Mackenzie had a right to prevent Eschmann from transferring his property for four years at least. He could wait two years to take his appeal and it takes two years to get a case decided in the Court of Appeals, as is evidenced by this very

case. Such a result is squarely in the teeth of Section 747 of the Civil Code of Kentucky, which requires the execution of a supersedeas bond to stay the enforcement of a judgment.

Without running the risk of rendering himself liable on such a bond for the 10% penalty prescribed by the Civil Code, Mackenzie has obtained the full benefit of a supersedeas by the judgments of the lower courts in this case.

Maxwell v. *Bank of New Richmond,* 77 N. W. 149, 101 Wisc. 286.

Hicks mortgaged his property to Simonton as trustee to be by the trustee sold and the proceeds distributed among certain creditors of Hicks. The plaintiff sued Hicks and served Simonton as garnishee, thereby acquiring a lien upon the property of Hicks in the hands of Simonton. Simonton answered as garnishee and the attachment was discharged, but an appeal was immediately taken without supersedeas. Pending the appeal Simonton sold the property and distributed the proceeds among those creditors of Hicks named in the mortgage. The case was reversed, the court holding that the plaintiff by his attachment acquired a good lien on the property of Hicks in the hands of Simonton. Upon the return of the case to the lower court, an attempt was made to hold Simonton liable, together with the creditors of Hicks who had received the proceeds of the property pending the appeal.

The court held, however, that when the attachment was discharged and the effect of that judgment was not stayed by supersedeas, Simonton had a perfect right to deal with the property as if there were no lien thereon and the creditors of Hicks had a perfect right to receive the proceeds of such property and neither Simonton nor such creditors could be made to refund the sums received.

> "It follows that if a judgment be rendered in the court of original jurisdiction in favor of the garnishee, and the lien of the plaintiff be not continued pending an appeal or review on writ of error, and the garnishee treat the property sought to be reached as free from the equitable lien pending the proceedings, and by reason of a reversal of the judgment the cause proceeds to a new trial, *he should be allowed to plead the disposition of the property while discharged of the lien, as a defense.* Webb v. Miller, 24 Miss. 638.
>
> "The result of the application of the principles stated in the foregoing, to the case before us, is that *the defendant came rightfully into possession of the money received from Simonton, has a right to retain the same, and that plaintiffs have no claim thereto* whatever. The judgment in favor of Simonton discharged the equitable lien of plaintiffs, and it was not revived by a reversal of the judgment to the prejudice of the garnishee defendant or those dealing with him. The lien not being continued pending the appeal, it was lost beyond recovery by the disposition of the property pursuant to the judgment discharging the garnishee. The judgment of the trial court to the contrary was erroneous and must be reversed."

In the case at bar when the lien was destroyed by the judgment of the lower court, the corporation, which was in the same position as Simonton, the trustee, in this case, had a perfect right to deal with the property as if there was no lien and so did the transferees from the defendant, Eschmann.

It is the general rule that where a lien is procured by an attachment, and that lien is discharged by the judgment of the lower court, persons in possession of the property are entitled to and are required to deal with the property as if there were no lien.

Stephens, Judge, v. *Willis,* 21 Ky. L. Rep. 170 (*Infra.*).

2. MACKENZIE'S CASES DISTINGUISHED.

Mackenzie relies on the following Kentucky cases: *Clarey* v. *Marshall,* 4 Dana, 95; *Golden* v. *Riverside Coal & Timber Co.,* 184 Ky. 200; *Webb* v. *Webb's Guardian,* 178 Ky. 152; and the Illinois case of *Miller* v. *Doran,* 245 Ill. 200; 91 N. E. 1039. None of these cases is at all similar to the one at bar.

2. (a) *Clarey* v. *Marshall,* 4 Dana, 96 (1836).

Marshall contracted to sell Edmondson 5,000 acres of land. Edmondson sued Marshall asking that Marshall be specifically directed to convey the 5,000 acres to Edmondson. By error the commissioner conveyed 5,559 acres. The heirs of Marshall "who had been non-residents and infants, filed a bill of review for

correcting the decree, for errors on its face, so as to reduce the quantity of land conveyed to 5,000 acres, conformable with their father's obligation."

The court held that Edmondson never acquired a good title to the extra 559 acres and that purchasers from him took only the title he had which was no title so far as the 559 acres was concerned. The case did not involve the rights acquired by a purchaser pending an appeal. There was no appeal.

Section 747 of the Civil Code as to the effect of appeals without supersedeas had not been passed. The purchase was made pending the hearing on the "bill of review" which suspended the effect of the judgment (Eastman v. Amoskeag, 47 N. H. 71); but an appeal, or the right to appeal, in no wise suspends the effect of a judgment unless a supersedeas is issued, as provided by Section 747 of the Civil Code.

Webb v. *Webb's Guardian,* 178 Ky. 152.

The sole and only point decided in this case was that a purchaser at a judicial sale of land takes a good title even as against infant defendants and even though the judgment of sale was erroneous and was afterwards reversed. This case involved the rights of a purchaser at a judicial sale; it sustained the rights of the purchaser, and is no authority at all upon the rights of one who purchases at a private sale from a defendant whose property has been adjudged to be free of lien.

Golden v. *Riverside Coal & Timber Co.*, 184 Ky. 200.

This case involved the rights of a purchaser from a defendant whose title was held good by a Circuit Court, but there are two reasons why the case is not in point here.

First, the purchase was made from the defendant *before the judgment of the Circuit Court was entered.*

The purchaser, the Riverside Coal Company made a contract to purchase the property on September 3, 1912, and the judgment of the Circuit Court upon which it relied was not entered until September 27, 1912. The court in its opinion said: "On the 23rd day of September, 1912, and before the judgment which was appealed from had been rendered," the purchase was made.

In the *second* place, a supersedeas bond was actually executed upon the day after the judgment was entered and before the deed was delivered or money paid.

> "This judgment was rendered on the 27th day of September, 1912, and Golden prayed and was granted an appeal from the judgment to this court. On the following day he attempted the execution before the clerk of the Circuit Court of a supersedeas bond, and thereafter perfected the appeal."

The court's statement that Golden "attempted" the execution of a supersedeas bond is not altogether clear. As a matter of fact, he did execute such a bond and that fact was stipulated by the parties in the

case as appears from the record in that case now on file in the office of the clerk of the Court of Appeals of Kentucky at pages 91 and 92.

In short, the statements relied on from the Kentucky cases were pure *dicta.*

2. (b) The Illinois rule sustains the position of A. Engelhard & Sons Company.

Miller v. *Doran*, 245 Ill. 200, 91 N. E. 1039.

Birdie Doran owned stock in the U. S. Steel Corporation. Her husband wrongfully abstracted the certificates from her box and pledged them for his own debt with Miller & Co.

Miller & Company sent the stock to the Steel Company for transfer upon its books, and that transfer being refused, Miller & Co. sued the Steel Company and Birdie Doran, asking that it be adjudged to be the owner of the stock and that the corporation be required to transfer the same.

The judgment declared Miller & Company to be the owners and ordered the transfer. Before Doran appealed, Miller & Company filed a replevin suit and secured possession of the certificates from the Steel Company. Then Miller again presented the certificates to the Steel Company and it transferred same first to Miller & Company and *later to innocent purchasers.* Doran then perfected her appeal. The case was reversed and the stock ordered transferred to Birdie Doran. The Steel Company defended against

any liability on the ground that it had transferred the stock pursuant to the judgment of the lower court. The court held:

> "The first decree entered in this case and under which the corporation claims to have transferred said stock and delivered same to L. D. Miller & Company has been reversed, *and said corporation were parties to the case in which said decree was entered,* and they are bound by the reversal of said decree and cannot justify the transfer and delivery of said stock by reason of said decree.
>
> "It is not denied by the corporations that the general rule that parties to a suit are bound by a reversal of a decree is as announced in Ure v. Ure, 223 Ill. 454, 79 N. E. 153, 114 Am. St. Rep. 336, where it was held that the effect of reversing a decree is to abrogate the decree, and that thereafter the cause will stand in the trial court precisely as it did before the entry of the decree, *and that a party to the record cannot acquire any right based upon such erroneous decree which he can assert subsequent to its reversal.*"

The court in its opinion cited the case of Hay v. Bennett, 153 Ill. 271, 38 N. E. 645, where an administrator, pursuant to a judgment of court paid money to a third party, but the judgment was reversed and the administrator was held liable for the $3,500.00.

The court in the Doran case referring to the administrator case says, "The administrator having been a party to the suit in which the original decree was entered, he was bound to know that proceedings were legal and free from error, and that, the decree

having been reversed he was bound by such reversal and that he could not defend against the repayment of said sums of money by virtue of said reversed decree, although he had paid the money relying upon the decree while the same was in force and unreversed."

The case differs from this in the following particulars:

(1) Engelhard Company was not a party to the suit.

(2) Doran owned this stock and therefore no one else had the right to transfer it, whereas, Mackenzie only claimed a lien on the stock and its true owner had a perfect right to transfer it.

(3) The transfer was the proximate cause of the loss as the stock by reason of the transfer had gotten into the hands of purchasers for value.

(4) Even if the case were thought to be analogous, it is no authority here for it is based upon the rule peculiar to Illinois, that a judgment which is subsequently reversed furnishes no protection whatever to a *party to the litigation,* for acts done under the judgment while it was in force. The Court of Appeals of Kentucky in the case of *Bridges* v. *McAllister,* 106 Ky. 791, points out that the Illinois rule in this respect is peculiar.

> "The opinion is supported only by some cases in Illinois and California and is contrary to the rule followed by the United States Supreme Court and all other State courts so far as we have seen."

However, the Illinois case was based entirely upon the fact that the corporation was a party to the ac-

tion and that a party to an action must know that the decision of the lower court is erroneous, if it is erroneous. The Illinois Court, if the corporation had not been a party to the action, would clearly have decided the case in favor of the corporation.

Ure v. *Ure,* 223 Ill. 454, 75 N. E. 153.

One-half of certain property was left to John; the other half to Robert for life, the remainder to Robert's children. The lower court decided that Robert took an estate in fee in his one-half. Robert then sold a part of his one-half of the property to John, who sold same to third persons; and Robert sold additional parts of his one-half to third persons. After reversal, it was held that John, being a party to the action, must restore to Robert so much of Robert's property as remained in John's hands, and must account for so much thereof as he had sold to third persons. As to third persons, both those who had purchased from John and those who had purchased from Robert at the time when the judgment of the lower court apparently invested Robert with a perfect title they had by their purchases acquired a good title, because they were not parties to the record.

> "A party to a suit is presumed to know of all the errors in the record, and such party cannot acquire any rights or interests based on such erroneous decree that will not be abrogated by a subsequent reversal thereof. If such party has received benefits from the erroneous decree or

judgment, he must, after reversal, make restitution, and, if he has sold property erroneously adjudged to belong to him, he must account to the true owner for the value. Titles acquired by parties to the record under an erroneous decree or judgment will be divested by the subsequent reversal of such decree or judgment, but a different rule applies where a stranger to the proceeding, without notice, acquires rights under the decree before reversal. His title will not be affected. Innocent third parties have a right to rely upon a judgment or decree of a court having jurisdiction to pronounce it. They are not required to look beyond the question of jurisdiction, and if the decree is one whch the court has jursdiction to render, both as to the subject-matter and the parties, innocent purchasers acting in good faith will be protected, notwithstanding the subsequent reversal of the decree or judgment. Montanye v. Wallahan, 84 Ill. 355; Thompson v. Frew, 107 Ill. 478; Crawford v. Thomson, 161 Ill. 161, 43 N. E. 617."

Chicago & N. W. Railroad Company v. *Garret,* 239 Ill. 297, 87 N. E. 1009.

Mrs. Chatterton owned certain property, and she procured a divorce from her husband. By the terms of the divorce decree the husband's dower interest was destroyed. Mrs. Chatterton or her heirs sold the property to purchasers, who were aware of the fact that the case was pending on writ of error in the Appellate Court. Thereafter, the case was reversed, the Appellate Court holding that Chatterton's dower interest remained in the property; but upon suit by Chatterton against the purchasers, it

was held that the purchasers, who purchased, when, according to the judgment of the lower court, in the divorce action, Mrs. Chatterton or her heirs had a perfect title, could not be deprived of their title by Mr. Chatterton:

> "Assuming, but not deciding, that appellants had notice of the pendency of the writ of error, we are brought to the question whether they took subject to the final disposition of the case. The writ of error was not a supersedeas. The decree was therefore not affected by it, but, until the judgment of reversal was rendered, was valid and effectual, entitled to full faith and credit in all courts, and enforcible by all appropriate means. Had it required the payment of alimony, such payment might have been enforced by execution or attachment in spite of the pendency of the writ of error. * * * *Without such supersedeas, the doctrine of lis pendens has no application to a writ of error. Everybody was entitled to act upon the decree as a valid decree, and rights acquired in good faith by strangers to the decree whether with or without notice of the writ of error, cannot be affected by its reversal. The title of the appellants, Jones and Strickler, was not, therefore, subject to appellee's claim of dower."*

These cases hold that even where real estate is involved, if same is adjudged to belong to A. and that judgment is not superseded, a purchaser from A, though with full knowledge of the pendency of a writ of error, acquires a good title.

The statement is sometimes seen that a purchaser pending an appeal is a purchaser *pendente lite*. Be-

fore the Codes a defeated litigant had an absolute right to appeal, and upon the appeal his case was tried by the Appellate Court *de novo* without any regard for the decision of the lower court. (3 C. J. 315.) The appeal removed the entire case to the Appellate Court. An appeal then served the same function as the motion for new trial serves now, except that the new hearing was before a new court, and the new trial was allowed as a matter of right. Obviously, pending the appeal, the purchaser did purchase *pendente lite* because the case was simply waiting another trial, just as now after a motion for a new trial is sustained. The Code changes all that. The purpose of an appeal is to correct the errors of the lower court. Section 747 of the Code was adopted for the very purpose of enabling the successful litigant to get the fruits of his victory pending an appeal, unless prevented from so doing by a supersedeas.

(3) THE TRANSFER BY THE CORPORATION ON FEBRUARY 20, 1915, WAS JUSTIFIED BY THE THEN SUBSISTING JUDGMENT. A SUBSEQUENT REVERSAL OF THAT JUDGMENT COULD NOT RENDER THAT ACT TORTIOUS.

The corporation which was not a party to the litigation in the lower court cannot be held liable for a tort in doing an act which, when done, was justified by a subsisting judgment. The judgment of the Cir-

cuit Court, if right, justified the transfer of the stock. The act done in 1915 could not become tortious by reason of the reversal of the judgment in 1917.

Bridges v. *McAllister,* 106 Ky. 791.

The parties to the litigation owned adjoining farms. If a certain ditch was left open, Bridges land was flooded, and if closed, McAllister's land was flooded. McAllister was opening the ditch when Bridges sued to enjoin its opening and the lower court ordered McAllister to fill the ditch up again which he did, thus causing his land to be flooded. The Court of Appeals then reversed the decree, holding that the ditch should be left open and McAllister sued for damages caused by the overflow on his land while the appeal was pending. The court held that McAllister could have superseded the judgment and avoided the damages, but, having not done so, he could not hold Bridges liable for tort.

> "The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal, when it was not superseded. In Freeman on Judgments, Section 482, it is said:
>
> " 'But a subsisting judgment, though afterwards reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal.' "

Later the Court says:

> "The same principles are laid down in Black on Judgment, Sections 170, 355. In Kaye v.

Kean, 18 B. Mon. 839, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed.

The court said:

"'The judgment of the Circuit Court was not void, but merely erroneous. * * *

"These cases proceed upon the principle that what was lawful when done does not become unlawful by reason of subsequent acts. The chancellor in entering the judgment in the case referred to, did not act as the agent of either of the parties.

* * * * * * *

"We have been referred to no case, and can find none, where an action for damages has been sustained upon the reversal of a judgment for acts done pursuant to it, as for a tort. The facts that there are no precedents for such recovery seems at this day conclusive that it has not been recognized as admissible by either the bench or the bar. When a judgment is reversed, restitution must be made of all that has been received under it, but no further liability should in any case be imposed. The case of Hays v. Griffith, 85 Ky. 375 (3 S. W. 341, and 11 S. W. 306), is not supported by the weight of authority and cannot, in our judgment be maintained on principle, so far as it lays down a greater liability.

* * * * * * *

"Appeals may be taken from judgments, ordinarily, within two years, but sometimes within five or twenty years, and it would often produce intolerable hardship to hold a litigant responsible for the consequences of an erroneous judg-

ment under such circumstances. The object in having trust estates, including those of descendants, or those assigned for the payment of debts, settled in equity under the direction of the chancellor, is to protect the parties in the payment of the money, as well as to secure to every one his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund under a reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation."

(4) ONE WHO ACTS IN A MANNER JUSTIFIED BY A SUBSISTING AND UNSUPERSEDED JUDGMENT IS PROTECTED BY SAID JUDGMENT, EVEN THOUGH THE ACT IS NOT DONE BY *COMPULSION* OF THE JUDGMENT.

But it is said the rights protected are only those done by compulsion of the judgment and that the judgment in this case did not direct Engelhard to do anything. A distinction is sought to be made between acts done by *compulsion* of the *judgment* and those done by *permission* of the judgment, but the distinction fails.

Porter v. *Small* (Ore.), 120 Pac. 393, 4 L. R. A. N. S. 1197.

The parties were all in one irrigation district. Small, a defendant, in a pending action, was adjudged to be entitled to use 650 inches of the waters

of Silver Creek, and in reliance on that judgment, he continued to use 650 inches or so much thereof as he wanted.

The appellate court upon appeal held that Small was entitled to use only 40 inches of the water. By reason of Small's excessive use of water, pending the appeal, the other users had been damaged and sued Small for those damages. The Oregon court stated the contentions of the parties as follows:

> "If the modification of the decree by this court restores all parties to their original status, and attaches to all acts done in pursuance of it the same wrongful character which they would have possessed had no such decree been rendered, then defendant is a trespasser *ab invito,* and the demurrer was not well taken. If, on the other hand, the decree of the circuit court was valid until reversed, and the defendant had a legal right to rely upon the correctness of it, his act in pursuance of it, if then lawful, will not become a tort by reason of a modification of the decree by an appellate court."

After reviewing the authorities at length, the court concluded that Small was not liable in tort for acting as the judgment of the lower court justified him in acting as long as it was in force. The opinion of the court concludes with this language:

> "Plaintiffs did not seem to have such confidence in the merits of their appeal as to be willing to take any chance of paying damages in case it should be adjudged groundless, and they should not now be permitted to mulct Small in *damages because he was not wiser than the Cir-*

cuit Court, and did not know the law which this court consumed 125 pages of the Oregon reports in explaining.

"It is often said that there is no wrong without a remedy, and, while this is generally true, a remedy may be lost by inaction or want of diligence; and if we concede that it was wrong for defendant to assume that the circuit court had properly adjudged the law, we have already indicated that plaintiffs had it in their power to minimize the effects of that wrong by giving a proper undertaking, or by applying to this court for an injunction. But we are not prepared to say that defendant, under the circumstances, was guilty of an actionable wrong.

"The defendant had the right to indulge *in this presumption that the judgment was right, and if his act was not a tort when performed it cannot become a tort by relation, upon reversal of the decree.*"

Hall v. *Smith-McKenney Co.*, 162 Ky. 159:

"And everything that is done under the judgment before it is superseded will be valid—

"When the judgment is so superseded, what has been done under it which was legal when done is not thus rendered illegal."

Stephens County Judge v. *Willis*, 21 Ky. Law Rep. 170, 51 S. W. 9.

Willis sued Baker and served the Board of Commissioners of Kenton County as garnishees, thereby attaching funds then in the hands of the garnishees and owed Baker. The suit was tried and judgment rendered for defendant. Thereupon, the Board of Commissioners paid to Baker the money

which it owed to Baker. In the meantime Willis had appealed from the judgment but did not supersede same until after the Commissioners made the payment to Baker. The case was reversed by the Court of Appeals and it was held that judgment should have gone for Willis in the lower court and his attachment should have been sustained. He then sought to hold the Board of Commissioners liable for the funds which they had paid out to Baker. But the Court of Appeals of Kentucky held that they had paid out these funds at a time when, according to the judgment of the Circuit Court, Willis had no lien on such funds and that they were not liable upon a reversal of said judgment to pay the funds to Willis.

> "When the judgment of October, 1892, was rendered, dismissing the petition of Willis, it had the effect to discharge the attachment (Sections 228 and 260 of the Civil Code of Practice), and if Willis desired to suspend the operation of that judgment he could have only done so by the execution of a supersedeas bond. This he did not attempt to do for more than twelve months after the entry of the judgment, and after the commissioners had paid to Baker the fund attached in their hands. The reversal by this court of the judgment in that case, upon the question of partnership between Baker and Willis, does not affect appellant's liability as garnishees, and we are of the opinion that as Willis failed to execute the supersedeas bond suspending the judgment dismissing his petition at the time his appeal *was prosecuted the commissioners were authorized to pay the balance due Baker*

to him, and cannot again be held liable therefor. (Showalter v. Simmons, 5 Ky. Law Rep. 423; Frazier's Ex'ors v. Paige, 82 Ky. 73; Peek's Ex'or v. Peek's, 21 Ky. Law Rep. 15.)

This case seems identical in principle with the one here under consideration. The corporation is certainly not charged with any more burdensome duty as to the transfer of shares of stock than is a garnishee who is actually served with process for the purpose of requiring it to deliver the money or property of defendant in its hands to plaintiff or into court, but even in the case of a garnishee, where there is a judgment of the lower court denying the lien, the garnishee is justified in paying out the money.

It will be noted that the garnishee was not ordered by any judgment of any court to pay this money to Baker. Its sole justification was that it had a right to pay it to Baker because the court had adjudged that Willis had no lien on it.

Etheridge withdrew the money by *permission* of the court, not by *compulsion,* and paid it to his creditors who were not compelled by the judgment to receive it, and yet the judgment protected said creditors. (Fidelity Trust & Safety Vault Co. v. Louisville Banking Company, *supra.*)

Harding voluntarily released his wife from liability on the attachment bond, because under the judgment he had a right so to release her, not because he was compelled so to do. (Hey v. Harding, *supra.*)

Simonton, Trustee, paid out money to Hicks' creditors because he had the right to do it, the court having adjudged that the attaching creditors had no lien. The judgment did not compel Simonton or order him to make such payment, but furnished him a complete protection. (Maxwell v. Bank of New Richmond, *supra.*)

Small used 650 inches of water because he had that right under the court's judgment. He was not compelled to use any water. But the court's judgment furnished him a complete protection. (Porter v. Small, *supra.*)

The Board of Commissioners paid out the attached funds to Baker, because the attachment of Willis had been discharged. There was no judgment compelling the Board or ordering the Board to make this payment, but the judgment destroyed the lien claimed by Willis and furnished a complete protection to the Board. (Stephens, County Judge, v. Willis, *supra.*)

(5) AN INTERPLEADER PROCEEDING BY THE CORPORATION WOULD HAVE BEEN USELESS AS THE RESPECTIVE RIGHTS OF MACKENZIE AND ESCHMANN TO THE STOCK WERE RES ADJUDICATA WHEN THE CORPORATION TRANSFERRED SAME.

The transfer of the stock to McDowell and Mrs. Eschmann was made possible by Mackenzie's own negligence in failing to take any steps to stay pro-

ceedings upon the judgment of the Circuit Court and he cannot make the corporation pay any damages arising by reason of his own negligence.

When the certificate was presented to the corporation in February, 1915, and it was asked to transfer the stock, what was it to do? Mackenzie answers that the corporation should have filed a bill of interpleader making both Mackenzie and Eschmann parties, and requiring them to litigate their respective rights to the stock in question. In such a proceeding assume that Mackenzie set up his alleged lien on the stock. Eschmann would have responded by pleading the judgment of the Jefferson Circuit Court, which was in full force and effect and which held that Mackenzie had no such lien. That judgment would have been *res judicata* upon that issue.

No. 2 Ruling Case Law, page 117:

> "A writ of error does not, however, even when an appropriate bond is given, vacate or annul the judgment, nor is such the effect of statutory appeals in the nature of writs of error. Thus, though there are decisions to the contrary, the better rule seems to be that so long as the judgment remains unreversed, its conclusiveness as *res judicata,* as between the parties, is not affected, and it is still operative as a merger of the cause of action, *and a bar to its further prosecution.*"

That point has also been decided by this court.

Deposit Bank of Frankfort v. *Board of Council of Frankfort,* 191 U. S. 499, 48 L. Ed. 276.

"We are unable to find reason or authority supporting the proposition that because a judgment may have been given for wrong reasons, *or has been subsequently reversed, that it is any the less effective as an estoppel between the parties while in force.*

"In the Crescent City, etc., v. Butchers' Union, etc., 120 U. S. 141, 30 L. Ed. 614, the question of what effect should be given to a decision of a court of the United States as proof of probable cause in a suit for a prosecution which was alleged to be malicious, was before the court. It appeared that the judgment relied upon had been subsequently reversed, and it was held that this made no difference unless it was shown that the judgment was obtained by means of fraud. Mr. Justice Matthews, delivering the opinion of the court, said:

" 'Its integrity, its validity, and its effect are complete in all respects between all parties in every suit and in every forum where it is legitimately produced as the foundation of an action, or of a defense, either by plea or in proof, as it would be in any other circumstances. *While it remains in force it determines the rights of the parties between themselves, and may be carried into execution in due course of law to its full extent, furnishing a complete protection to all who act in compliance with its mandate, and even after reversal it still remains, as in the case of every* other judgment or decree in like circumstances, sufficient evidence in favor of the plaintiff who instituted the suit or action in which it is rendered, when sued for a malicious prosecution that he had probable cause for his proceeding.' "

So then we submit that a bill of interpleader would have been wholly ineffective. Would it be fair to hold that the corporation, a wholly disinterested party, must assume the burden and expense of instituting and prosecuting such litigation in order to protect Mackenzie from his own negligence? The execution of a supersedeas bond by Mackenzie, who was interested, would have been much simpler and less burdensome than the institution and prosecution of an interpleader proceeding by the corporation, which was not interested.

Another reason why the interpleader proceeding would have been ineffective is that Eschmann was only seeking to transfer the legal title to his stock and he had a perfect right to do that, as we will hereafter point out, even though it should be held that a lien then existed in favor of Mackenzie.

(6) ESCHMANN HAD THE RIGHT TO DEMAND THAT HIS STOCK BE TRANSFERRED EVEN THOUGH MACKENZIE HAD A LIEN THEREON.

At the time the transfer was made, even if it be assumed that Mackenzie's lien was good, Eschmann had the right to transfer the legal title. As we have pointed out, the corporation's act was not necessary to the transfer of the legal title and its transfer had no effect on the equities of other parties.

First National Bank of Lexington v. *Bowman,* 168 Ky. 433.

Rogers owned certain shares of stock in the Third National Bank of Lexington. This stock was pledged by Rogers to secure an indebtedness of his and the certificates were in the hands of the pledgees. Rogers executed an instrument transferring the title to Mrs. Bowman. The First National Bank sued Rogers and undertook to attach the stock.

Mrs. Bowman set up her claim to the legal title subject, of course, to the original claim of the pledgee, who had possession of the certificates, and the court sustained Mrs. Bowman's title, even though there was no delivery of the certificates, nor was the stock transferred upon the books of the company. The fact that the stock was pledged did not deprive the owner of the right to transfer the title.

It can scarcely be disputed that the holder of the legal title to property has a perfect right to transfer that legal title, even though there may be a lien on the property.

National City Bank of Chicago v. *Wagner,* C. C. A., 8th Circuit, 216 Fed. 473.

Certain shares of stock were pledged and the certificates endorsed and delivered to the pledgee. While so pledged the owner by an instrument, transferred her title to certain brokers and in this suit involving the rights of the original owner the original pledgee

and the brokers who were transferees, it was held that the transfer to these brokers carried the title, even though the certificates were not delivered nor the stock transferred on the corporate books.

(7) The Circuit Court of Appeals (p. 43) recognized the right of Eschmann to transfer his stock but said this:

> "It would seem that a court would have compelled the issue of a new certificate to Eschmann's nominees if that certificate should have had endorsed upon it a memorandum that it was subject to whatever lien Mackenzie might establish."

In other words, the corporation has been held liable in this case for what "might" happen in spite of the fact that thing has not happened in this case.

> "The wrong done to Mackenzie was therefore the issuing of the new certificate in such *a way that it might reach a bona fide purchaser and so perhaps cut off Mackenzie's lien,* but the wrong did not extend to the entire value of the stock since Mackenzie had therein no interest to be injured except to the extent of his lien."

We do not see how liability can be based on such a conclusion as that. The wrong is that the certificate is so issued that it "might reach a bona fide purchaser and so *perhaps* cut off Mackenzie's lien." The fact is that it has not been shown that the stock has reached the hands of a *bona fide* purchaser. According to plaintiff's contention in this case, it has not. A part of the stock went to V. H. Engelhard, whose

knowledge of the litigation was the only knowledge chargeable to the corporation and the other part went to Mrs. Eschmann, the wife of the defendant in the suit, *who still has it* (R., p. 17).

(8) HAD THE CORPORATION REFUSED TO MAKE THE TRANSFER UPON ESCHMANN'S DEMAND ON FEBRUARY 15, 1915, IT WOULD HAVE RENDERED ITSELF LIABLE IN DAMAGES. THE POSSIBILITY OF AN APPEAL FROM THE JUDGMENT DID NOT JUSTIFY REFUSAL OF THE CORPORATION TO ACT IN ACCORDANCE WITH SAID JUDGMENT.

American National Bank v. *Douglas,* Ark., 189 S. W. 161, L. R. A. N. S. 1917-B, 588.

The Coronado Coal Company sued a Miners Union for damages and attached funds belonging to the Union in the hands of the American National Bank. The petition of the Coronado was dismissed and the attachment was discharged, but the company notified the bank not to pay out the money belonging to the Miners' Union as it was the purpose of the coal company to appeal and to supersede the judgment. The Miners' Union drew a check for the amount of the deposit and presented it to the bank but the bank refused payment and undertook to justify its action by reason of the notice which had been given it that the Coronado Coal Company proposed to appeal the case. The Arkansas court held that the

bank was liable for refusing to treat this money as if no lien existed and for refusing to pay same upon the check of the Miners' Union, and that if the plaintiff, Coal Company, wanted to retain its lien, it was required to take some of the steps for that purpose which the law allowed. The court held that the bank was liable for refusing to pay the check under the circumstances. Had a supersedeas issued the bank would have been justified in refusing to pay the check (National Bank v. Johnson, 96 S. W. 433, Ky.). So in this case. If the corporation had declined to recognize the rights of Eschmann as owner of this stock, it would have been liable in damages to Eschmann for converting the stock.

This court will not penalize the disinterested corporation for its action when the whole loss, if any, was due to the failure of Mackenzie to act when it was his duty to act. (See opinion C. C. A., R. 42.)

(9) THE FAILURE OF ESCHMANN TO RECORD THE TRANSFER FROM HIMSELF TO HIS WIFE, AS REQUIRED BY THE KENTUCKY RECORDING STATUTE, FURNISHED THE CORPORATION NO EXCUSE FOR REFUSING TO MAKE THE TRANSFER.

It is claimed that the failure to record the transfer of the stock from Eschmann to his wife in some way makes the corporation liable. Section 2128 of the Kentucky Statutes so far as pertinent, reads as follows:

"A gift, transfer or assignment of personal property between husband and wife *shall not be valid as to third persons,* unless the same be in writing and be acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded."

(a) This statute is a part of an act of 1894. Prior to its passage it was the settled law of Kentucky that the phrase "personal property" or "personal estate" when used in a statute providing that a mortgage on personal estate, if recorded, was notice to all the world had no application to shares of stock or other intangible personal property.

U. S. Bank v. Huth, 4 B. Monroe, 423.

"Again the policy which dictated the statutes is not applicable to a chose in action or claim for a debt as there is no such visible possession of such claims or separation of the right in them from the apparent ownership which is calculated to deceive creditors and purchasers."

Spalding v. Paine's Administrator, No. 5 Ky. L. R. 391, 81 Ky. 416.

"These certificates of stock are in the pockets of the owner, and go with him where he may happen to locate as choses in action, or evidence of his right without any means on the part of those with whom he proposes to deal on the faith of such a security of ascertaining whether or not this stock is in pledge or mortgaged to others. He finds the name of the owner on the books of the company as subscriber of paid-up stock amounting to 180 shares, with the certificates in his possession; pays for these certificates their full value, and has the transfer to him made on

> the books of the company, thereby obtaining a perfect title. What other inquiry is he to make so as to make his investment certain and secure? Where is he to look in order to ascertain whether or not this stock has been mortgaged? The chief office of the company may be at one place today and at another tomorrow. The owner may have no fixed or permanent abode, and with his notes in one pocket and certificates of stock in the other, and the one evidencing the extent of his interest in the stock of the corporation, the other his right to money owing him by his debtor, we are asked that the mortgage is effectual as to the one and inoperative as to the other."

With the law in this condition the Legislature in 1894 passed the act in question using the phrase "personal estate" in a recording statute. It must be presumed, therefore, under familiar principles that in using the phrase "personal estate" the Legislature intended that it should have the meaning fixed definitely many years before by the Court of Appeals.

But it is said that Eberhardt v. Wahl, 124 Ky., holds that the statute does apply to the transfer of corporate stock. It it to be noted that the right of the transferee in that case was sustained on the ground of subrogation. True, the court seemed to assume that the statute applied. The opinion indicates no consideration of the cases just referred to or of the reasoning herein presented.

Furthermore, in several other cases the court has acknowledged that the question of the applicability of this statute to intangibles is an open question.

As late as November, 1923, in the case of Fogarty v. Neal, 201 Ky. 85, the court said:

> "For the purpose of this case it is unnecessary to inquire whether Section 2128, *supra*, applies to the transfer of a promissory note."

(b) It will be noted from the cases hereinafter referred to that the Court of Appeals of Kentucky has invariably sustained such transfers in the absence of fraud, in spite of non-compliance with this statute, and that in the last case decided by it construing this statute, the court refers to it as a "*statute dealing solely with the fraudulent transfer of property between husband and wife.*" No fraud is charged in this case and certainly it is not charged that the corporation participated in or had knowledge of any fraud. The Court of Appeals holds that the statute had no effect unless the transfer was made in the State of Kentucky.

Fogarty v. Neal (*supra*):

> "For the purposes of this case it is unnecessary to inquire whether Section 2128, *supra*, applies to the transfer of a promissory note, or whether the payor of a note is a third person within the meaning of the statute. It may be conceded that the note is a Kentucky contract, and that its legal effect is to be determined by the law of negotiable instruments as applied in this State, but the question here presented is not the legal effect of the instrument, but the validity of the assignment. The section in question is not a part of the negotiable instrument law, but a separate and independent statute dealing solely

with the fraudulent transfer of personal property between husband and wife, and the question is: Does it govern the transaction here involved? Occasionally a question may arise as to whether the law of the domicile of the parties or of the place where the transfer is made, or of the place where the property is situated governs the fraudulent transfer of personal property. Hardaway v. Semmes, 38 Ala. 657; Ward v. Coon Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 71 A. S. R. 207; Hallgarten v. Oldham, 135 Mass. 1, 46 Am. Rep. 433; Schmidt v. Perkins, 74 N. J. L. 785, 67 Atl. 77, 122 A. S. R. 417, 11 L. R. A. (N. S.) 1007, and note; Gilkey v. Pollock, 82 Ala. 503; Boehme v. Rall, 51 N. J. Eq. 541, 26 Atl. 832. But no such question can arise in this case. At the time of the transfer here involved A. L. Neal and his wife were not only domiciled in Oklahoma, but the note itself was possessed, transferred and delivered in that State. *That being true, the law of Oklahoma controls and not the Kentucky statute, which has no extraterritorial effect.* Kurmer v. O'Neal, 39 West Va. 515, 20 S. E. 589; Willis v. Memphis Grocery Co. (Miss.), 19 So. 101; Fally v. Steinfield, 10 Ky. L. R. 982."

(c) THE TRANSFER FROM THE HUSBAND TO THE WIFE WAS VALID BETWEEN THE PARTIES THOUGH SAME WAS NOT IN WRITING NOR RECORDED AS REQUIRED BY THE STATUTE.

The transfer could only be questioned by creditors or purchasers. The corporation was not such a "third person" as could raise the question of its validity.

McWethy's Admr. v. *McCright,* 141 Ky. 816.

A decedent gave bonds to his wife, without recording the transfer. He died intestate and upon the settlement of his estate, his heirs claimed that the transfer was invalid as to them because not recorded. The Court of Appeals of Kentucky held that the transfer was valid between the husband and wife, and that no one but the purchaser or a creditor could question such a transfer, and in so holding the court said:

> "While in a sense the words 'third persons' will include all persons who are not parties to the contract or transaction; these words as used in the statute do not refer to or include a person, not a party to the transaction, who has no interest in the property given or conveyed, or does not sustain to the donor the relation of creditor or to the property that of an innocent purchaser, for persons without such interest or relationship could have no ground of complaint."

After referring to various Kentucky cases, the court distinctly held that the transfer as between the husband and the wife was valid.

> "It will be found from a careful examination of the opinions in these *two cases that they recognize the validity, as between husband and wife, of a gift of personal property from one to the other by word of mouth and manual delivery,* notwithstanding the provision of the statute which requires that in order to make such a gift valid as to third persons it must be in writing, duly acknowledged and recorded."

(d) A CORPORATION IS NOT LIABLE FOR REGISTERING A VOIDABLE TRANSFER.

Casey v. *Kastell,* 237 N. Y. 305, 142 N. E. 671, Court of Appeals of New York, January 15, 1924.

Plaintiff, an infant, delivered stock to her agent, which stock bore the endorsement of the infant. The agent caused the United States Steel Company, which had issued the stock, to transfer same. The infant thereupon repudiated the entire transaction, and the court held that the agent and the brokers who had sold the stock were liable, but the Court of Appeals reversed the decision of the lower court which had held the Steel Company liable for transferring the stock on the books.

> "The transfer being voidable only and legal and valid when made, the corporation had no right to refuse a transfer (Smith v. Railroad, 91 Tenn. 221, 239). It could have been compelled by the purchaser by recourse to the proper remedy to make it. (Travis v. Knox Terpezone Co., 215 N. Y. 259, 264.)
>
> "It follows that the judgment should be reversed as to the United States Steel Corporation and affirmed as to the individual defendants."

See also Smith v. Nashville D. R. Co., 18 S. W. 546.

(e) THE CORPORATION CANNOT INQUIRE INTO THE VALIDITY AS BETWEEN THE PARTIES OF A TRANSFER OF ITS STOCK. THE CORPORATION HAVING LAWFULLY TRANSFERRED THE STOCK IN 1915 WAS NOT LIABLE FOR REFUSAL TO RE-ISSUE SAME IN 1919.

Fletcher's Cyc. of Corporations, Vol. 6, page 6412:

> "Right to inquire into validity of transfer as between the parties. Ordinarily the corporation is not concerned with the consideration paid for a transfer of shares of its stock. And the assignee has the right to have the stock transferred on the corporate books irrespective of the inadequacy of the price he paid therefor or the fact that the stock was a gift, although the inadequacy of the consideration may be considered as a circumstance to support a contention that no actual sale occurred.
>
> "Nor, as a rule, can the corporation inquire into or pass upon the legality of the transaction by which its shares are transferred from one person to another, or justify a refusal to register the transfer on the ground that the consideration for the transfer was illegal."

The same thing is pointed out by other text books.

Machen on Corporations, Section 934:

> "Upon principle, where registration of a transfer is wrongfully refused, the transferee has substantially the same remedies as the transferer against the company, notwithstanding the fact that the very question at issue is his right to be deemed a member * * * that the transfer

was without consideration does not diminish the transferee's rights, nor is the illegality of the consideration any defense to the company.

"The fact that the transfer was executed in pursuance of an illegal gambling contract is no defense to the company when the objection has not been raised by the transferer."

We submit, therefore, that the non-compliance with this statute, whatever effect it may have on Mrs. Eschmann's rights, if she should be sued, can have no effect upon the liability of the corporation for making the transfer; because the corporation was not such a "third person" as had a right to take advantage of the statutory provision or as had a right to refuse to make the transfer because of the non-compliance with the said provision.

THIRD POINT.

Even if the Act of the Corporation in Transferring the Stock was Wrongful, no Liability Attaches, Because (A) no Loss is Shown to have been Suffered by Mackenzie, and (B) the Transfer on the Books was not Essential to the Transfer of Title, and such Transfer on the Books was not the Proximate Cause of any Loss Suffered by Mackenzie.

If it be conceded that the act of the corporation in transferring the stock was wrongful, still no liability can attach to the corporation for two reasons:

First, because no loss has been suffered by Eschmann; and

Second, because if any loss has been suffered, the act of the corporation in transferring the stock on its books was not the proximate cause of the loss.

MACKENZIE HAS SUFFERED NO LOSS.

It is not claimed by Mackenzie that this stock has by reason of the corporation's transfer come into the hands of a purchaser for value without notice of Mackenzie's rights. He claims, on the contrary, that McDowell and V. H. Engelhard and Mrs. Eschmann had full knowledge of the rights of Mackenzie, whatever those rights were, in view of the judgment of the Jefferson Circuit Court. Those original transferees still hold the stock (R. 17). He has proven his debt with Eschmann's administrators and, for all that appears in this record, he has collected same, or if not, there is no reason why he cannot collect same. Suppose, therefore, that he lost his lien on the stock. He still has a perfectly collectible debt. If his debt is collected, he has suffered no damage.

A TRANSFER ON THE CORPORATE BOOKS IS NOT ESSENTIAL TO A TRANSFER OF TITLE.

Second, the act of the corporation in transferring the stock is not the proximate cause of any loss, which Mackenzie may have suffered, because the transfer on the books of the corporation is not necessary for the transfer of title to corporate stock and the transferees have no better title after the corpora-

tion has transferred it than they had before the corporation transfers it.

It will be admitted, we assume, that the corporation is not liable unless its act in transferring the stock was the proximate cause of some loss.

Fletcher Cyc. of Corporations, page 6448:

> "And it must also appear that its act in recognizing the assignment and making the transfer operated to aid the breach of trust and contributed directly to the loss of the stock by the *cestui que trust.* In other words, the negligence of the corporation in making the transfer must be the efficient and proximate cause of such loss."

The transfer on the books did not aid the transfer of title.

Fletcher's Cyc. of Corporations, Vol. 6, page 6331, Section 3794:

> "Even where the charter or by-laws of a corporation or the general law under which it is organized provides that its stock shall be transferable only on the books, as between the parties, an unregistered transfer is valid."

The entry of the transfer on the books is not necessary for the translation of the title.

Husband v. *Linehan,* 168 Ky. 304, 181 S. W. 1089, Annotated Cases, 1917-D, 954.
Stowe v. *Harvey,* 241 U. S. 199, 60 L. Ed. 952.
Thurber v. *Crump,* 86 Ky. 408.

The Court, in passing on this question, and in discussing the statute which requires the registration of the transfer on the corporation's books, said:

"This provision was certainly made for the protection of the corporation and purchasers, but not for the protection of the creditors of the stockholders. It is but right that a company should know at all times who its stockholders are; their right to vote, their right to draw dividends; their right to shape and control the destiny of the company in the prosperity and welfare of which each member has a direct interest."

That a complete and perfect title may be procured by an endorsement and delivery of the certificate without registering the transfer on the books is pointed out in this language:

"By this section Wilson was not denied the right to transfer his stock in the company. By the common law, his stock being personal property, he had the right to sell it at private sale and pass a perfect legal title to it, which sale, upon delivery of the stock itself, if susceptible of manual delivery, if not, upon the delivery of the certificates—a symbolical delivery—would pass the legal title to the vendee, which title would prevail against any prior lien upon the stock or executory contract for the sale of it, of which the vendee had no notice, which sale would also prevail against any subsequent sale or transfer of the same stock. So far, therefore, as the statute treats the transfer of stock, as between the vendor and vendee, as valid it is simply declaratory of a common-law principle. This common-law principle is unrestrictive of the right of the owner of stock to sell it at private sale and pass a perfect legal title to it. James Wilson was the legal owner of the stock; the absolute legal title was in him; when he sold it to the appellant, he

parted with all the title that he had; he had the legal title and he sold that title; there was nothing left for him to do concerning the transfer. All the title that he had vested in his vendee. It is well settled that when a person makes an absolute sale of property, to which he has a legal title, the legal title passes to the vendee, subject, however, to such restrictions as our registration laws may put upon such transactions for the protection of innocent purchasers, etc."

It will not do to say that the vendees did not give a valid consideration or that they had knowledge of the circumstances. These observations might be pertinent in a suit against them, but as between them and the transferer title certainly passed. If a transaction is subject to be set aside, it cannot be done by the corporation which had no interest, nor can the corporation be made liable for a wrong of other parties. It follows, we think, clearly, that the act of the corporation in transferring the stock on its books bore no relation whatever to any injury that may have been suffered by Mackenzie.

THE TRANSFER ON THE CORPORATE BOOKS IS NOT THE PROXIMATE CAUSE OF ANY LOSS MACKENZIE MAY HAVE SUFFERED.

Smith v. *Nashville D. R. Company,* 91 (Tenn.) 221, 18 S. W. 546; Lurton, J.

The testator, Baugh, devised certain stock in defendant corporation, or one-fifth thereof to his daughter, Fannie Baugh, for life with remainder

over. The certificate was issued to Fannie without qualification as to her interest being limited.

Subsequently, Fannie Baugh married Smith and Smith becoming her trustee, procured possession of the certificate standing in her name. Smith, as trustee, and Fannie Baugh, assigned the certificate to Rizon, a dummy, and on the same day he assigned the same certificate to Clarke, Dodge & Company and that company assigned same to Newcomb, who turned in the original certificate issued to Fannie Baugh and caused a new certificate to be issued in his name. Smith, trustee, got the proceeds and squandered them. The action sought to hold the corporation liable for the loss, without making the fraudulent trustee or his sureties or Newcomb, the holder of the stock, parties.

The court held that the transfer was as effectually made by the endorsement of the certificate and the delivery thereof to Newcomb as it was made after the certificate was turned in by Newcomb and the new certificate issued to him. Title passed without a transfer on the books, and therefore the transfer on the corporate books was not the proximate cause of the damage.

> "If a corporation transfer shares upon a forged assignment and power of attorney, or upon the authority of one wrongly assuming to be the agent of the owner, or upon a void decree or judgment, its act would be a nullity, in so far as it was thereby sought to affect the rights or status of the true owner as a shareholder. Such

owner would remain a shareholder, regardless of the illegal cancellation of the evidence of his right, and notwithstanding the issuance of a new certificate to the transferee in place of that canceled. This right would be no more affected by the taking up of his certificate without valid authority than it would be by its accidental destruction. A court of equity would compel the corporation, in either case, to recognize him as a shareholder, by the issuance of a new certificate, and compel an accounting for dividends wrongly paid over to the transferee. Telegraph Co. v. Davenport, 97 U. S. 369; St. Romes v. Cotton-Press Co., 127 U. S. 614, 8 Sup. Ct. Rep. 1335; Dewing v. Perdicaries, 96 U. S. 193; Pollock v. Bank, 7 N. Y. 274; Loring v. Salisbury Mills, 125 Mass. 138; Brown v. Insurance Co., 42 Md. 384; Hambleton v. Railroad Co., 44 Md. 551."

The Telegraph Co. case and the St. Romes case so much relied on by the Circuit Court of Appeals, wholly overlooks the distinction pointed out by Judge Lurton in the next sentence:

> *"But when the assignment of shares is made by the person appearing on its books to be the absolute owner, but the assignment was in breach of trust, then the liability of the corporation to the cestui que trust for transferring such shares depends, not only upon its being shown that the corporation had either actual or constructive notice of the breach of trust, but upon its further appearing that its act in recognizing the assignment and making the transfer operated to aid the breach of trust, and contributed directly to the loss of the stock by the cestui que trust.* If it be assumed that the facts known to the corporation at the time of its transfer of these shares to Newcomb were sufficient to put it upon in-

quiry as to the terms upon which this stock was held, and as to the power of the assignees to make sale, and the purposes of such sale, then it should be held justly liable for the injurious consequences to the *cestui que trust* of its act, under such circumstances, in making the transfer to the purchaser. *But, if its transfer to him did not affect the rights and interests of the cestui que trust by reason of the fact* that the purchaser had acquired a good and undefeasible title before such transfer, then it would not be just to hold that it had aided in a breach of trust already irremediable. The rule on this subject has been well stated by Mr. Lowell in his recent and most valuable work upon Transfer of Stocks. 'The liability of the corporation,' says Mr. Lowell at Section 153, 'for recording a transfer made in breach of trust, depends very much upon the position of the purchaser. If he has acquired, before transfer on the books, a perfect title to the stock, free from all claims on the part of the *cestui que trust,* the breach of trust is complete before the corporation is asked to transfer; and when it records the transfer the corporation is merely doing what it is bound to do, and is not helping the trustee to commit the breach of trust. The corporation can therefore incur no liability to the *cestui que trust* by recording a transfer to a *bona-fide* purchaser for value, unless there is a regulation making the stock transferable only on the books, *and unless that regulation can be so construed that the act of the corporation is necessary to pass the legal title.*' To same effect, see Sections 99, 100, 138, 149, 150.

"The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust.* If the purchaser's title was complete without the transfer, then it cannot be the efficient, proximate cause of the loss. Such a

purchaser could compel a transfer to himself, and it would be the grossest injustice to hold the corporation responsible."

"The title of the purchaser upon the assignment of the certificate was complete without registration or transfer on stock books of the corporation. The rule requiring transfer on the books of the company by the well-settled line of decisions in this State, and by the great weight of authority in the courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote, and to whom it may pay dividends. *A complete equitable and legal title passes by the act of the owner in assigning the certificate, and the subsequent registration of this assignment and issuance of a new certificate in no way affected the rights of the cestui que trust.*"

Therefore, we repeat, even if it be held that the transfer was illegal, no damage has followed from the wrongful act, first, because no damage at all has been suffered, and, second, because if any damage has been suffered, the action of the corporation in transferring the stock was not the proximate cause thereof.

(4) THE CIRCUIT COURT OF APPEALS ERRED IN DECIDING THAT IT WAS BOUND BY THE DECISIONS OF THIS COURT TO HOLD THE TRANSFER ON THE CORPORATE BOOKS TO BE THE PROXIMATE CAUSE OF LOSS TO MACKENZIE. ESCHMANN, BEING THE OWNER, HAD A RIGHT TO DEMAND AND ENFORCE THE TRANSFER OF HIS STOCK ON FEBRUARY 20, 1915, IN SPITE OF ANY LIEN MACKENZIE MAY HAVE HAD.

We argued to the Circuit Court of Appeals that the act of the corporation in transferring the stock was not the proximate cause of the loss to plaintiff, if any. The court thought the argument "persuasive"; but a "majority of the court" held that it was bound to hold to the contrary by the decisions of this court in *Telegraph Company* v. *Davenport,* 97 U. S. 369, and *St. Romes* v. *Cotton Press Co.,* 127 U. S. 614.

We think the court entirely misapplied those decisions. In the St. Rome's case a person procured possession of the widow St. Rome's certificates and the corporation, without any authority from the widow St. Romes, transferred the shares to other parties. The same thing was done in the Davenport case by means of a forgery of the owner's name to a power of attorney.

In those cases persons, admittedly the true owners, sued the corporation for dividends on the stock. The corporation undertook to defend upon the

ground that it had transferred the stock to third persons. The true owners replied that those transfers being made without their authority, could not affect their rights as stockholders. The true owners were not concerned with what title, if any, the transferees took, as against the corporation.

The distinction between the liability of a corporation for making a transfer without authority from the true owner, and its liability for making such transfer pursuant to the direction of the true owner, but in violation of some equitable rights of third persons was aptly pointed out by Judge Lurton in the case of *Smith* v. *Nashville, Etc., R. R. Co., supra.* He referred to the Davenport and St. Romes cases and other cases and stated that where shares had been reissued by the corporation without the authority of the true owner, the rights of the true owner were no more affected than they would be by an accidental destruction of the certificates. He then pointed out that where the transfer was made pursuant to the authority of the true owner, but in violation of some equitable right of the third person, that third person, as a condition precedent to recovering anything from the corporation, must establish two things: first, that the corporation acted with knowledge of his equitable rights, and, second, that the act of the corporation in making the transfer contributed to or caused the loss of those rights:

> "But when the assignment of shares is made by the person appearing on its books to be the

absolute owner, but the assignment was in breach of trust, then the liability of the corporation to the *cestui que trust* for transferring such shares depends, not only upon its being shown that the corporation had either actual or constructive notice of the breach of trust, but upon its further appearing *that its act in recognizing the assignment and making the transfer operated to aid the breach of trust, and contributed directly to the loss of the stock by the cestui que trust.*"

"The corporation can therefore incur no liability to the *cestui que trust* by recording a transfer to a *bona-fide* purchaser for value, unless there is a regulation making the stock transferable only on the books, *and unless that regulation can be so construed that the act of the corporation is necessary to pass the legal title.*" To same effect, see sections 99, 100, 138, 149, 150.

"The negligence of the corporation in permitting the transfer must be the efficient and proximate cause of the loss sustained by the *cestui que trust. If the purchaser's title was complete without the transfer, then it cannot be the efficient, proximate cause of the loss.* Such a purchaser could compel a transfer to himself, and it would be the grossest injustice to hold the corporation responsible."

We have pointed out that the transfer on the corporate books, being unnecessary for the translation of title, did not give the purchasers any better title than they would have had had there been no transfer on the books.

It seems clear, therefore, that the loss, if any, suffered by Mackenzie is not traceable to the act of the corporation.

FOURTH POINT.

Refusal of Corporation to Transfer Stock to Mackenzie After His Alleged Purchase at the Judicial Sale.

Eschmann caused the stock to be transferred on the books of the company to McDowell and Mrs. Eschmann on February 20, 1915 (R. 17), and in April, thereafter, Mackenzie appealed the case (R. 18); the judgment was reversed by the Court of Appeals of Kentucky in March, 1917 (R. 18); a final judgment was entered in the Jefferson Circuit Court ordering a sale of the stock on October 31, 1917 (R. 18); the alleged sale was had on July 15, 1918 (R. 19); the Commissioner's report of sale was confirmed October 30, 1918; and the bill of sale issued to Mackenzie by the Commissioner December 7, 1918 (R. 20). Mackenzie demanded the stock April 29, 1919 (R. 19).

1. Obviously if the corporation acted lawfully when it transferred the stock to McDowell and Mrs. Eschmann, it could not be liable for refusing to do an impossible thing, that is, to issue the stock to Mackenzie four years thereafter. However, it is said that the judgment of court adjudging a lien on this stock in favor of Mackenzie and confirming the sale to Mackenzie is *res judicata;* and that the Engelhard Company cannot now question that judgment. Engelhard Company was *not a party* to the litigation when the judgments relied on were entered and had

not been for something like six years. The judgment, therefore, cannot be said to be *res judicata* as to A. Engelhard & Sons Company.

2. THE JUDGMENT OF SALE IS NOT *RES ADJUDICATA* AS TO A. ENGELHARD & SONS COMPANY, WHICH WAS NOT A PARTY TO THE LITIGATION.

> "A decree has no legal efficacy against persons not party or privy to the suit in which it was pronounced."

McAllister v. *Bridges,* 19 Ky. Law Rep. 107:

> "It has been even held that none are bound by a judgment unless the record shows that they were parties or privies to the same. The fact that one was active in sustaining a claim or contention does not make him a party."

And again:

> "Appellant was not a party to that suit, and it is an obvious principle of justice that no man ought to be bound by a proceeding to which he is a stranger."

Everidge v. *Martin,* 175 S. W. 1004, 164 Ky. 497:

> "A judgment of a court does not bind any person except such persons as are parties to the suit or their privies, and they in no wise bind a party who is not before the court."

Without citation of further authorities we submit that neither the judgment adjudging a lien to Mackenzie nor the order confirming a sale nor any

other order entered in that case is *res judicata* in so far as Engelhard & Sons Company is concerned.

3. The situation is not affected at all by reason of the fact that Mrs. Eschmann, as administratrix, was a party to that suit, because a judgment in an action to which an administratrix is a party is not binding in a subsequent action where that same person is individually a party.

Trozell v. *Delaware, Etc., R. R. Co.*, 227 U. S. 433, 57 L. Ed. 586.
23 Cyc. 1244.

4. MACKENZIE'S TITLE TO THE STOCK AS PURCHASER HAS NOT BEEN ADJUDGED. HE TOOK ONLY THE TITLE WHICH ESCHMANN HAD AND THAT WAS NO TITLE.

Nor can Mackenzie claim that his title is adjudged by reason of his purchase at the judicial sale for a purchaser at a judicial sale takes only the title of the person whose title is therein adjudged to be sold. Only Eschmann's title was adjudged to be sold and he had no title at the time of the judgment of sale as we have heretofore pointed out.

16 R. C. L., page 136:

> "However, it may be stated as a broad rule that a purchaser at a judicial sale takes by virtue of his purchase all the right, title and interest of the parties to the proceedings in and to the property conveyed to him, *and no more*.

16 R. C. L., page 138:

"A judicial sale carries only the interest estate and rights in the premises that the parties to the proceedings had and could have asserted, no more and no less. The purchaser succeeds to their rights and attitude in respect of the property sold, 'takes their shoes,' stands in their place, acquires their interest as it existed in their hands, subject to all infirmities of title then attaching to the estate, and to all equities, known or secret, which operated as a limitation upon the nominal or apparent estate which they had."

Beale v. *Stroud*, 191 Ky. 755, 231 S. W. 522:

"Perhaps one of the oldest principles applicable to a judicial sale, and which has been uniformly adhered to in this jurisdiction, is that there is no warranty of the title of lands sold under a judgment of court by the owner or any party to the action, and the doctrine of *caveat emptor* applies with full vigor to such a sale. The purchaser must beware of what he purchases at such a sale."

16 Ruling Case Law, page 119:

"86. CAVEAT EMPTOR.—There are many cases holding generally that in judicial sales the rule of caveat emptor applies in its utmost vigor and strictness. The court sells, and can undertake to sell, only the right, title, interest and property, such as it is, of the parties to the proceeding and the purchaser is charged with knowledge of that fact. It therefore follows that he takes upon himself the risk of finding outstanding rights that could have been asserted against the parties to the proceedings; and if by reason

of the existence of such rights, whether known or not, or discoverable or not, he takes less than a complete title to the entire property offered, or even takes nothing at all, by his purchase, he cannot complain and has no defense upon being sued for the purchase price.

The Engelhard Company is not then bound by the judgment or the sale thereunder and is free to show that that judgment and sale did not result in vesting title in Mackenzie. Of course, if the points heretofore made are sustained, it does not matter about the proceedings under this judgment, but if those points should be not sustained, nevertheless it is true that Mackenzie acquired no title to the stock for the following reasons:

(a) The court had lost jurisdiction over the stock in question and its attempt to adjudge a lien thereon was void.

(b) The attempted judicial sale was void because a court cannot sell property not in its possession, and

(c) Neither the judgment nor bill of sale described the stock with sufficient accuracy to effectuate a sale of the particular stock in question.

(5) BY VOLUNTARILY RELINQUISHING POSSESSION OF THE CERTIFICATE MACKENZIE LOST HIS LIEN THEREON.

When the judgment was entered, which ordered the certificate of stock to be delivered to the defendant, Eschmann, the plaintiff, Mackenzie, failed to supersede the judgment and therefore, by his volun-

tary act he lost or surrendered possession of the pledged certificate. It is familiar law that the voluntary relinquishment of the possession of the thing pledged destroys the lien.

Jones on Pledges and Collateral Securities, 2nd Ed., Par. 40:

> "It is a well settled principle that a delivery back of the possession of the thing pledged, terminates the pledgees' title, unless such re-delivery be for a temporary purpose only, or be to the pledgor in a new character such as special bailee or agent."

Harding v. *Eldridge,* 186 Mass. 39

> "It is uniformly held that by a contract of pledge only a special title passes to the pledgee which depends upon actual possession, while the general right of property remains in the pledgor, and in order to hold and transfer his lien there must be not only a physical delivery where the chattel can be thus transferred, *but continued possession also retained."*

So in *Story on Bailment,* 6th Ed., Sec. 287, the author says:

> "In the case of a pledge of personal property, the right of a pledgee is not consummated except by possession; and ordinarily when that possession is relinquished, the right of the pledgee is extinguished or waived."

31 Cyc. 817:

> "Since the lien of the pledgee is dependent upon his possession of the pledged property his

abandonment of the property or his voluntary relinquishment of its possession to the pledgor * * * constitutes a waiver of his lien."

Pomeroy Equity Jurisprudence, 2nd Ed., Sec. 1233:

"It is the very essence of this condition that while the lien continues the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the encumbrance. The equitable lien differs essentially from the common law lien, which is simply a right to retain possession of the chattel until some debt or demand due to the person thus retaining is satisfied; and possession is such an inseparable element, that if be voluntarily surrendered by the creditor, the lien is at once extinguished."

(6) THE ATTEMPTED SALE OF THE CHATTEL NOT IN THE COURT'S POSSESSION WAS INEFFECTIVE TO CONVEY TITLE.

Neither the court nor the officer which undertook to make the sale had possession of the thing to be sold, nor did any party to the litigation have possession of the thing to be sold. The corporation itself was not before the court. Therefore, the attempted sale was void.

No. 16 Ruling Case Law, page 49:

"Personal property sold at a judicial sale is generally required to be present at the place of sale, and subject to the inspection of all who attend."

Note 14, Am. Decisions, at page 323:

> "The decided preponderance of authorities is in favor of the proposition that if the property is not present at the sale, such sale will be void."

We are not presented with the question as to whether the sale would have been valid had the corporation, which in a sense has possession of its stock, been a party. It was not a party.

(7) THE ORDER OF SALE AND BILL OF SALE DID NOT DESCRIBE THE THING SOLD SUFFICIENTLY TO EFFECT A VALID SALE.

Neither the judgment nor the bill of sale described the sale with sufficient accuracy to effectuate a sale of any particular stock. It is familiar law that the thing to be sold must be specifically described.

16 Ruling Case Law, 23.

> "One of the characteristics of a judicial sale is that it acts upon specifically described property."

The judgment in this case and the bill of sale described the thing sold as follows:

> "3. The plaintiff, Louis B. Mackenzie, has a lien upon certificate No. 24 of the capital stock of A. Engelhard & Sons Company, a corporation for 130 shares of the capital stock in said company and upon any certificate or certificates which have been, or may hereafter be, issued by

> A. Engelhard & Sons Company to the defendants, Edgar A. Eschmann and Bettina E. Eschmann, executors of the estate of F. W. R. Eschmann, deceased, in lieu of said certificate No. 24, and has a lien upon said 130 shares of stock represented by said certificate, said lien being to secure the plaintiff in the payment of the debt evidenced hereby and his costs herein" (R. 29).

Certainly certificate 24 could not be sold under that judgment because it did not exist and the only other thing that the judgment purported to order sold was:

> "Any certificate or certificates which have been or may hereafter be issued by A. Engelhard & Sons Company to Edgar A. Eschmann and Bettina E. Eschmann, executors of the estate of F. W. R. Eschmann, deceased."

The court will bear in mind now that they could not sell certificate 24 and they only undertook to sell such certificate as had been issued to the *executors*. No certificate had been issued to the executors and no stock was owned by the executors. No certificate had been issued to the executors and no stock was owned by the executors. Therefore, the court did not undertake to sell anything that had any existence.

The purchasers at the judicial sale took nothing, because nothing was sold. Nothing existed that met the description contained in the order of sale and in the bill of sale.

FIFTH POINT.

A Court of Equity will not Enforce Rights Claimed Under a Judgment Unless it be Shown that the Enforcement of Such Rights would Produce Equity. No Such Showing Can be Made Here.

Even if it be held that no point heretofore made in this brief is sustainable, yet a court of equity would not enforce the claims of Mackenzie in this case, because to do so would work injustice and be inequitable.

The facts are that Mackenzie started out with a claim against Eschmann on a promissory note, which note was procured from Eschmann by gross fraud, of which Mackenzie was cognizant (Record, 21) but which fraud did not support a defense at law, because Eschmann's son had condoned the fraud (Record, 27).

By reason of Mackenzie's own failure without excuse to supersede the judgment the corporation was led to act thereon, and to make the transfer complained of.

A studied attempt to excite the sympathy of the court on behalf of Mackenzie is made, based on the charge, directly or inferentially asserted all the way through the brief for Mackenzie, that Engelhard, McDowell and Eschmann formed a conspiracy to transfer this stock so as to defeat the collection of any judgment that Mackenzie might procure. This is a peculiar case in which to make such a charge or to

intimate that an effort was made to conceal the facts. All of the facts were voluntarily stipulated by the parties. Those facts show that the parties acted in good faith and in reliance on what they believe to be their rights. Now that the principal actors, Engelhard, Eschmann and McDowell, are all dead, it is a simple thing, but we submit an unfair thing, to undertake to prejudice the court's mind by insinuations of fraud.

Furthermore, the corporation, which is the only defendant here, certainly was not a participant in any fraud, it had no chance to profit, and its innocent stockholders are not to be condemned because counsel conceives that there was a fraudulent motive in the minds of the individual actors in the transaction. If there was fraud, the transfers resulting therefrom could only be set aside in a direct suit against the transferees.

The same may be said as to the repeated charge made that Mrs. Eschmann gave no consideration for the transfer to her. The corporation does not know what consideration she gave; the stipulated facts do not indicate that she gave no consideration, and if she did give no consideration, the transfer was merely voidable. The charge of a lack of consideration is wholly improper in this case.

Mackenzie has lost nothing at all unless it be the credit of $100.00 on his judgment which he bid for the stock. He wants to mulct the corporation in damages and still collect his debt from the Eschmann estate.

He asserts that however inequitable his claim might be or whatever hardship its enforcement might work upon the corporation, that nevertheless his rights are *res judicata,* by reason of the order confirming his alleged purchase at the judicial sale. It is said that for this court to refuse to sustain the rights claimed to have been thus acquired, would be an unjustifiable rebuke to the Jefferson Circuit Court.

The answer to this is that the Jefferson Circuit Court has never had an opportunity to consider the rights of the corporation or of the transferees of this stock. Counsel well knew that the Jefferson Circuit Court would never sustain so inequitable a claim as is here presented, and he therefore brought his suit in the Federal Court in the hope that that court, in its anxiety to treat the State court's judgment with respect, might grant him some relief.

The Circuit Court of Appeals in the case at bar recognized that the present situation was created through the fault of Mackenzie:

> "The surrender and reissue of the certificate did not occur under circumstances which made the act wrongful as against Mackenzie in the manner and degree to which such an act is ordinarily wrongful as against the true owner. On the contrary, while Mackenzie *did not directly acquiesce in the withdrawal of the certificates, he contributed to create the situation attending the withdrawal, surrender and reissue.* To obtain a supersedeas would apparently have been no burden and would have avoided all later complications."

The Circuit Court of Appeals further held that it would be grossly inequitable to sustain Mackenzie's claim as asserted:

> "In this situation the parties came to the foreclosure sale of the stock. Its value was $17,000.00; the lien was about $10,000.00. It was quite evident that no sale could be had at which any fair value could be realized. No counsel would undertake to advise with certainty what title would pass. The books of the corporation showed no interest to sell. No stranger would pay a substantial price, because he would be buying only a law suit. Eschmann and his vendees would not bid, because they were advised and doubtless in good faith believed that no title would pass. The actual result was inevitable, viz., that Mackenzie would buy in the $17,000.00 of stock for a nominal price (he paid $100) and still leave his whole claim against Eschmann for the debt practically unimpaired. *This would be and was a grossly inequitable result. The situation could have been easily clarified, and it was Mackenzie's duty to procure that clarification before going to sale, if he expected to seek the aid of a court of equity in enforcing his rights as purchaser.* An appropriate proceeding could have been taken in the equity court where the case was pending, and probably as ancillary or supplemental to that case, whereby it would have been adjudicated, as between Mackenzie, the corporation, Eschmann and the purchasers *pendente lite,* just what title would pass by the expected sale. After such an adjudication the sale would have been fair to all concerned and all suitable equitable enforcement remedies could have been asked without embarrassment."

The Circuit Court of Appeals also recognized the rule that under such circumstances a court of equity was not bound by the rule as to *res judicata* to enforce a judgment when to do so would work an injustice.

> "The rule which shapes the relief given by a court of equity in circumstances where equitable considerations make that relief contingent upon plaintiff's acceptance of less than full legal rights, must vary in its application with every case. We have not found any application precisely similar to that which we now make; but we think it is required by the inevitable effect of similar rules."

We think the court's statement of the circumstances was quite accurate, but that it made an application of these rules which was wholly unjustified. It says in substance that the situation was created by the fault of Mackenzie. Unquestionably the corporation has not profited and could not profit in any way. To adjudge Mackenzie entitled to the relief prayed would be a gross injustice, says the court, but following this reasoning the court says that Mackenzie must have a part of the relief prayed, and that the corporation must pay to Mackenzie his debt, interest and costs, though that debt is a valid obligation of the Eschmann estate, and there appears to be no obstacle whatever to the collection of that debt. If there is any such obstacle, nothing that the corporation has done has created that obstacle.

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Counsel profess to be much alarmed at the rule that a court of equity will not use its equitable powers to enforce an unjust claim, even though based upon a judgment. However, this is a familiar rule of general application.

In 23 Cyc., page 1432, where the text treats of applications to the Chancery Court to enforce rights claimed under a judgment, this appears:

> "The complainant must of course show himself equitably entitled to the relief which he asks, and his petition will be defeated by anything showing that it would be unjust or unfair to grant it."

This court has more than once declined to enforce a judgment, even though an entirely valid judgment, and even though it was sought to be enforced against parties who were admittedly bound by it. A court of chancery will decline to enforce such a judgment, where its enforcement is inequitable, upon the same grounds that a court of chancery will decline to enforce a perfectly legal and valid contract where its enforcement would be inequitable and would produce a hardship.

Lawrence Manufacturing Company v. *Janesville Cotton Mills,* 138 U. S. 552, 34 L. Ed. 1005.

The Lawrence Co. sued the Janesville Co. to enjoin the use by the defendant company of the letters "LL" upon certain cotton sheetings. A decree permanently enjoining the defendant company from using such letters on cotton sheeting was rendered.

Thereafter, after a reorganization, the Janesville Cotton Mills resumed the use of the letters "LL" in connection with the sale of cotton sheeting. The Lawrence Company brought suit to enjoin the reorganized Janesville Company from using these letters, and the court held that the reorganized company was bound by the former decree but it further held that the original judgment enjoining the Janesville Cotton Manufacturing Company from the use of the letters "LL" was erroneous and should never have been entered, and it declined, therefore, to enjoin the reorganized company from using the letters, because it said that to do so would be unjust.

We quote from this court's opinion:

> "But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps, the sole aspect, in which it is framed, a bill to carry the former consent decree into execution, the Circuit Court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitf. Ch. Pl. 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree. Such is the language of Lord Redesdale in *Hamilton* v. *Houghton,* 2 Bligh,

P. C. 169, 193, and of Lord Chancellor Sugden in *O'Connell* v. *MacNamara,* 3 Drew & W. 411, 412. The same principle was announced as early as 1700 by the lord keeper in *Johnson* v. *Northey,* Finch Prec. in Ch. 134. See also *Lawrence* v. *Berney,* 2 Ch. Rep. 127, Adams, Eq. 416, 2 Dan. Ch. Pr. (4th Ed.) 1586. This rule was much considered and applied in *Wadhams* v. *Gay,* 73 Ill. 415, and approved by this court in *Gay* v. *Parpart,* 106 U. S. 679 (27: 256)."

Gay v. *Parpart,* 106 U. S. 679, 27 L. Ed. 257.

"We do not regard that it militates with the doctrine of the conclusive effect of what is *res judicata,* that where there is an incomplete decree, and it is ineffective for want of the provision of any means for its execution, and an application is made to a court of equity to supply the imperfection, so as to render the decree effective, then it is admissible to look at the real nature and character of the decree as it may appear in the light of surrounding circumstances, *for the purpose of determining whether there is such an equitable ground for action as will move a court of equity to interpose.*

"And upon an appeal to equity by original bill to lend its assistance for carrying it into execution because of an omission in the decree in providing any means of its execution, *it would seem reasonable that the same rule of the court's action should obtain as in case of any solemn agreement under seal; and where there are manifest the elements of injustice, mistake, surprise, misapprehension, and want of consideration, to remain passive.*"

Washams v. Gay, 73 Ill. 414.

This is the rule recognized, but we submit misapplied, by the Circuit Court of Appeals in the case at

bar. If Mackenzie could show, first, that he had been deprived of the means of collecting his original debt, and second, that he had been so deprived by the action of the corporation, and third that the corporation was not justified in making the transfer in reliance on the judgment, there might be some ground to contend that a court of equity should lend him its aid. In this case, he wants to punish the corporation which acted in good faith and in reliance on the judgment of the court; and he wants to gain for himself a net profit of more than $30,000.00, though there is no equity in his claim.

Counsel is alarmed at the conflict which would result between Federal and State courts should this court decline to exercise its equitable powers to enforce an inequitable claim based upon a State court judgment.

Hassall v. *Wilcox,* 130 U. S. 493, 32 L. Ed. 1001.

A statute of Texas provided that laborers on railroads should have a lien upon the railroads superior to all other liens.

Wilcox sued the railroad in a State court and procured a judgment which recited that it constituted a lien on the railroad prior and superior to all other liens. Later an action was instituted in the Federal Court by the holder of a mortgage, and Wilcox set up his judgment lien and asked its enforcement. The court held that the mortgagee was not a party to the State court proceeding, just as the Engelhard Company was not a party to the proceeding here, and

upon looking behind the State court judgment, it was found that the claims upon which the judgment was based did not constitute a lien under the statute, and therefore the claim was disallowed as a lien, though the State court judgment provided that it was a lien.

In the case of Gay v. Parpart (*supra*) the Federal court refused its aid in enforcing rights acquired under a State court partition proceeding, because the enforcement of those rights would be unjust.

Even if it be so nominated in the bond a court of equity will not decree the delivery of the pound of flesh, or if it does will accompany the decree with conditions rendering its enforcement impossible.

We respectfully submit that the case should be remanded to the District Court with directions to dismiss the petition.

J. Verser Conner,
Percy N. Booth,
Counsel for A. Engelhard & Sons Co.